

15 Lc.

h. THE *Mag. 10h*
COMMON LAW
OF
K E N T:
OR, THE
CUSTOMS
OF
Gavelkind.
WITH AN
APPENDIX
CONCERNING
Borough = English.

By THOMAS ROBINSON,
of Lincoln's Inn, *Esq;*

In the SAVOY:

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MDCCXLI.

22

FH
MVSEVM
BRITANNICVM

(iii)

TO THE
RIGHT HONOURABLE
P H I L I P
Lord *HARDWICKE*,
Baron of *HARDWICKE*,
Lord High Chancellor of
Great Britain.

My LORD,
THE Customs of *Kent*
have a natural Claim
to Your Lordship's Pro-
tection, not only as a Part of
that Law over which You pre-
side, but as they are the Usages
A 2 of

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The Dedication.

of a County, which, though on many Accounts memorable, glories in nothing so much, as in having sent forth Your Lordship to the common Benefit of the Kingdom.

A Dedication may serve to illustrate the Character of a private Patron, by ascribing to him Excellencies that he has not, or publishing those which he really has; but Your Lordship's eminent Virtues, and high Station have render'd the one impossible, and the other unnecessary. I have therefore no other Part left, but to embrace this Opportunity of publicly testifying my Duty to Your Lordship; and I cannot but flatter my self, that these First Fruits of my Studies may meet with a more favour-

The Dedication.

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favourable Reception, from a
Reverence to the Great Name
under whose Patronage they
now appear.

The Publick, My Lord, has
sometimes lamented, that the
highest Offices of the Law have
been conferred on Persons in
the Decline of Life, more out
of a Regard to past Services,
than the Expectation of fu-
ture; but the Vigour of Your
Lordship's Age and Constitu-
tion promises a long Conti-
nuance of the Publick Benefits
already derived from Your Ad-
ministration: The Happy Ef-
fects of which have rendered
it the constant Prayer of all
Honest Men, that You may
long live in the Enjoyment of
Your present Dignity, with the
same Abilities and Capacity to
adorn

The Dedication.

adorn it. To which General
Voice of Your Country I beg
Leave to add the particular
and sincerest Wishes of,

My LORD,

Your Lordship's

most obedient, and

devoted Servant,

Thomas Robinson.

THE
PREFACE.

THERE being already extant three Treatises, whose Titles bear a Resemblance to the present, the Author thinks it incumbent on him to say something in Justification of his troubling the Publick with one more.

Mr. Somner's Inquiry into Gavelkind is limited to the Etymology of the Term, and the Original and Antiquity of the Custom, with a few other speculative Points. Mr. Taylor is content with treating in general of the History and Etymology of Gavelkind, without any particular Regard to the Kentish Customs, to which he was an entire Stranger. Nor can the Author better shew the main Design of these two Writers to be different from his, than by making Use of their own Words:

Words: "Many other Things" (says Mr. Somner at the End of his Book) "offer themselves to his Discourse, that would treat of Gavelkind to the Full; but they are, I take it, mostly Points of Common Law, which because they are not only out of my Profession, but besides my Intention too; which was to handle it chiefly in the historical Part, and that no further than might conduce to the Discovery of the Primordia or Beginnings of it; I shall not wade nor engage any further in the Argument, lest I be justly censured of a Mind to thrust my Sickle into another Man's Harvest." And in like Manner Mr. Taylor informs the Reader, in his Preface, That "he presents to his View and Examination, not a Law Case on the Tenure of Gavelkind (for that would have proved beyond the Abilities of one that confesses himself no Lawyer, and professes himself ignorant in that Practice and Study) but only the History of it."

To the Account of the Kentish Customs at the End of Mr. Lambard's Perambulation of that County, the Author owns himself much obliged; and had that judi-

The P R E F A C E.

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judicious Writer professed to have treated of them as fully, as the Nature of the Subject would have permitted, he would not have attempted it after him: But as Mr. Lambard intended his only as a summary Account, so it is, perhaps, too closely confined to the Points in the Customal; And the Author having the Advantage to come after him, has had an Opportunity of clearing up some Matters left doubtful by Mr. Lambard, and of rectifying others that have the Appearance of ^a Errors: But to avoid misleading the Reader by any mistaken Conclusions of his own, he has given the Cases distinct where there is any Disagreement; and if he has sometimes ventured to give his own Opinion where the direct Authority of the Books is silent, he thinks he need not caution the Reader to give no further Credit to it, than as it shall appear to him to be reasonable.

He believes he has omitted no Case relating to his Subject to be found in any Book of Authority, either ancient or modern. Nor has he confined himself to the
b Cases

^a Vid. infra pag. 45, 66, 169, 171, 177, 183, 217, 254, 264.

The PREFACE.

Cases already in Print, but traced the Matter higher than the Books, and given the Reader all that occurs, either of Use or Curiosity, concerning these Customs, in the Records of the Proceedings before the Justices in Eyre for Kent, in the Reigns of Hen. 3. Ed. 1. and Ed. 2. and before the Justices of Assize for the same County in the Times of Hen. 3. Ed. 1. Ed. 2. Ed. 3. and Rich. 2. In those of the Reigns of Hen. 4 and 5. he found nothing worthy Notice. There are likewise most, if not all, the remarkable Records of the same Nature, to be found amongst those of the King's Bench in the foregoing Reigns, and a few in the Common Pleas; which the Author was directed to by the Indexes and Abstracts of those Records in the Office; to which, as well as the Records themselves, he found easy Access, by the Indulgence of the Gentlemen employed in the Custody of them. These make about a Fourth of the Book; and, he believes, will be thought the most valuable Part of it, as they are of an authentick Nature, and a Fund before unknown, and will be found to furnish much uncommon Matter, and to illustrate many Points left doubtful on the printed Books, and the modern Practice

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Practice of the Country. He hopes the Reader will not imagine that these Records are inserted as Precedents of Pleading, they being mostly of a Time when the Courts of Law had not arrived at their present Accuracy in that Particular; and were they more correct, yet as the Necessity of special Pleading in Actions for Lands is, in a great Measure, taken away by the modern Practice of trying Titles on the general Issue in Ejectment, they could, if used for that Purpose, only serve to encrease the Size of the Book, without any View of Benefit to the Reader. But he believes each of these Records will be found to contain some notable Point of the Customs, either confessed by the Parties in the Pleadings, found by the Jury, or adjudged by the Court.

As there is a general Prejudice against all Treatises on particular Heads of the Law, arising from the usual Publication of them, for the Hopes of a little Gain, in a more imperfect Manner than the same Persons would otherwise have committed them to the World; the Author thinks he ought, in Justice to himself, to declare that the Profit, if any, to arise from the Impression, is entirely

b 2

to

to the Bookseller ; and if the Book prove of Use or Benefit to his Countrymen, by giving them a more perfect Knowledge of their Customs, the Author has attained his End, in making that publick, which was originally intended for his own private Use in his Practice.

THE

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CHAR. IX

Of Customs common to all Kingdoms
Men.

Of Customs common to all Kingdoms
Men.

Of Customs common to all Kingdoms
Men.

ERRATA.

PAg. 91. lin. ult. for *for* read *of*. p. 95. l. 3:
for *it* r. *them*. p. 110. l. 14. for *his* r. *was*.
p. 163. l. 33. for *visus vel cognitus* r. *visa vel cognita*.
p. 174. l. 5. for *ways* r. *was*. p. 203. l. 6. for *que-*
rentur r. *queritur*.

APPENDIX

OF DUTIES

BOOK I.

CHAP. I.

Of the Etymology and several Significations of the Word GAVELKIND.

THE various Opinions of the Antiquaries concerning the Etymology of the Word *Gavelkind*, may be comprehended under these two Heads;

Chap. I.

1. Such as are founded on the Nature of the Lands in Point of Descent;

Or 2dly, On the Nature of the Services yielded by the Land.

The Conjectures of the first Kind are three; whereof the most common and vulgar compounds *Gavelkind* of the Words *Gife eal Cyn*, or *Give all Kind*; *Kynd* in * *Dutch* signifying a male Child. *Lamb. Peramb.* 584. And his Glossary to the *Saxon* Laws, *verbo Terra. ex scripto. Co. Litt.* 140. *Doderidge's English Lawyer*, 73. *Cowel in voce. Nat. Bacon*, of Government, Quarto Ed. 106. *Verstegan's* Restitution of decayed Intelligence, 57. *Daniel's Hist. of England* 38.

B

2. Sir

* But Mr. *Sommer* says that *Cynd* in that Language signifies all Children whether Male or Female.

Of the Etymology

Book. I.

2. Sir H. Spelman in his Glossary under the Word *Gaveletum*, expounds this Term a little differently, as derived from *Gavel* (*tributum vel debitum*) of Right belonging or given to, *Cyn* or *Kynd* (*soboli pueris vel generi*). And in like Manner it is explained in *Minshew's Dictionary* under the Word *Gavelkind*.

Powel's Welch
Hist. Edit.
1697. p. 22.

3. Mr. Taylor, in his History of *Gavelkind*, deduces the first Part of the Name from the antient *British* Word *Gafael*, or according to the *English* Pronunciation *Gavel*, which signifies a *Tenure*, p. 26. 96. from the Word *Gafaelu*, to hold, p. 92. But is something at a Loss to account for the Termination, and offers with some Diffidence two Derivations of it, one from the *British* Word *Kennedh* *Generatio* or *Familia*, and then the Compound will import *the Tenure of the Family*, p. 132. 147. 150. The other from the *Saxon* Word *Gecynde*, Kind or Sort; and he supposes that "the Saxons meeting with
" the *British Gavel*, and understanding it to
" be their common *Tenure*, added something
" to express it to their own Apprehensions,
" which being set together would signify, and
" that properly enough, *Genus Tenurae*," so called by way of Eminence, "because that
" *Tenure* deserved a Denomination of the
" highest Remark, it being, if not the only,
" yet the most eminent *Tenure* among them."
P. 134.

But the most natural and easy Account, doing least Violence to the Words, and best supported both by Reason and Authority, is that which is drawn from the Nature of the
Services;

Of the Name of Gavelkind.

3

Chap. I.

Services. According to this Exposition of the Term, it is derived from the *Saxon* Word *Gafol* or, as it is otherwise written, *Gavel*, which signifies *Rent* or a Customary Performance of Husbandry Works; and therefore they called the Land, which yields this Kind of Service, *Gavelkind*, that is *Land of the Kind that yields Rent*. This Derivation first attempted by Mr. *Lambard* in his *Perambulation*, 112. and followed by *Philipot* in his *Villare Cantianum* p. 2. Mr. *Sommer* warmly espouses and maintains with great Learning; proving by a Number of antient Records that *Gafol* or *Gavel* was a Word of frequent Use among the *Saxons*, and signified not only Tribute Tax or Custom, but also Rent in general; and that under this Term were comprehended all Socage Services whatsoever which lie in *Render* or *Feasance*; the Word being compounded with and applied to the Particulars wherein the Payment, or Performance of the Service consisted; as *Gavel-Corn* signifying Corn-Rent, *Gavel-erth* Tillage Service, and a Multitude of others: And the Tenant from whom these Services were due was called *Gavelman*. And *Gavelkind* is a Compound of this Word *Gavel* and *Gecynde*, which is Nature, Kind, Quality, or Condition; and therefore the proper Signification of the Term is Land of that kind or Nature that yields Rent, Censual or Rent-Service Land in Contradistinction to Knight-Service Land, which being holden *per liberum servitium armorum* yielded no Cens, Rent, or Service in Money, Provision, or Works. *Somn. c. 1.* So that those Lands are in *Kent*

Book I. called Gavelkind, which in other Countries are distinguished by the Name of Socage. Mr. Somner's Derivation of the Word is further supported by the Opinions of Mr. *Just. Fortescue* in his Remarks on his Ancestor's *Treatise of Monarchy*, p. 72. and of Mr. *Just. Wright* in his *Introduction to Tenures*, p. 209.

Gavelkind a
Tenure.
V. Somn. 144,
145.

P. 177, 180,
182, 183,
184.

If this be the true Etymology, it is evident that Gavelkind taken in the strictest Sense of the Word denotes the *Tenure* of the Land only (a), and that the Partibility and other Customary Qualities are rather extrinsec and accidental to Gavelkind than necessarily comprehended under that Term. The antient Charters in Mr. *Somner's Appendix* whereby Lands are granted *Tenendum in Gavelekende*, or *ad Gavelikendam reddendo*, &c. (an Expression frequent before the 18th Ed. 1. but not to be met with in any Grant since the Statute *Quia Emptores terrarum*) are strong and unanswerable Instances in Support of this Opinion; the *Tenendum* being the proper and usual

(a) It occurs in this Sense Litt. sect. 265. Fitz. Barre, 119. Prescription, 52. Rot. Claus. 16 H. 3. m. 14. & 17 H. 3. m. 17. & 37 H. 3. m. 19. in dorso. & 3 Ed. 1. m. 2. 39 H. 3. Itin. Kanc. rot. 1. in dorso. 43 H. 3. Itin. Kanc. rot. 13. 55 H. 3. Itin. Kanc. rot. 20. ibid. rot. 28. ibid. rot. 5. in dorso. rot. 7. rot. 13. rot. 14. rot. 15. in dorso. rot. 38. in dorso. rot. 47. in dorso. rot. 61. in dorso. rot. 62. rot. 76. 7 Ed. 1. Itin. Kanc. rot. 3. in dorso. 21 Ed. 1. Itin. Kanc. rot. 1. in dorso. rot. 23. rot. 70. rot. 53. 6 Ed. 2. Itin. Kanc. rot. 3. rot. 7. in dorso. rot. 17. Mich. 13 Ric. 2. C. B. rot. 645. Mich. 9 Ed. 2. C. B. rot. 240. Trin. 17 Ed. 3. B. R. rot. 32. Trin. 12. Ed. 1. C. B. rot. 68.

Significations of Gavelkind.

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usual Place in all Deeds for creating a new or specifying the old Tenure, and originally inserted for no other Purpose. Chap. 1.

Our Writers of the Law indeed have not always attended to the strict and original Sense of the Word, but in the common Language of their Books and Records from the earliest Times have spoken of Gavelkind as a Custom; and comprehend under that Denomination the several Customs annexed to Lands of this Tenure in the County of Kent. (b) Other Significations of the Word.

And

(b) Not only the Custom of Partition, of which the Instances are so numerous that they need not be cited, but the *special* Customs also are constantly pleaded as Customs of Gavelkind: As 1. *Tenancy by the Curtesy* in 55 H. 3. Itin. Kanc. rot. 51. 7 Ed. 1. Itin. Kanc. rot. 3. in dorso. 21 Ed. 1. Itin. Kanc. rot. 41. 6 Ed. 2. Itin. Kanc. rot. 17. Aff. in Com. Kanc. 16 Ed. 2. Wm. le Pede's Case. Aff. in Com. Kanc. 17 Ed. 2. & 19 Ed. 2. Robert Pykoc's Case. Aff. in Com. Kanc. 15 Ed. 2. Alex. de Greenhithe's Case. Aff. in Com. Kanc. 19 Ed. 2. Wm. de Adehullegate's Case. Mich. 13 Ric. 2. C. B. rot. 645. Fitzh. Aid, 129. & 144. Co. Lit. 30. a. 2dly, *Dower*. Pasc. 4 Ed. 1. C. B. rot. 21. Trin. 5 Ed. 2. B. R. rot. 4. Aff. in Com. Kanc. 17 Ed. 2. Joan Helles's Case. Mayn. Ed. 2. 284. Trin. 17 Ed. 3. B. R. rot. 32. 21 Ed. 4. 54. a. Cro. Eliz. 125. Davies & Selby. Co. Litt. 33. b. 3dly, *Alienation by an Infant* of 15. 55 H. 3. Itin. Kanc. rot. 90. in dorso. Mich. 11 Ed. 3. B. R. rot. 133. Aff. in Com. Kanc. 47 Ed. 3. Simon Parlebien's Case. 9 Ed. 3. 38. Aff. in Com. Kanc. 13 Ric. 2. Peter Hamon's Case. 11 H. 4. 33. and *Wardship of Infants*. 21 Ed. 1. Itin. Kanc. rot. 35. in dorso. Mayn. Ed. 2. 610. Aff. in Com. Kanc. 7 Ed. 3. rot. 2. 4thly, *The Father to the Bough*, &c. Rot. claus. 8 Rich. 2. m. 2. Fitzh. Prescription, 40. Stath. Abr. tit. Custom

And the Term has by the modern Use acquired still a different Signification, more confined as to the Properties contained under it, but more extensive in Point of Place, being generally at this Day made use of to denote the Partibility of the Land only exclusive of all other Customary Qualities; nor is Gavelkind in ordinary Speech restrained to *Kentish* Lands, but equally and indifferently applied to all partible Lands wheresoever they lie (c).

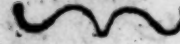
The

Custom pl. 2. Dyer 310. b. 5thly, *The Trial in a Writ of Right*. 39 H. 3. Itin. Kanc. rot. 3, 4, 18, 25. in dorso. and 55 H. 3. rot. 28, 29, 51, 57. in dorso. and 67. in dorso. 21 Ed. 1. Itin. Kanc. rot. 40. in dorso. 6. *Inclosing of Common*. Mayn. Ed. 2. 508. Whether indeed the Custom of *devising* was ever reputed Part of the Custom of Gavelkind I cannot say, not having been able to trace any Footsteps of such a Custom in ancient Times.

(c) By the Opinion of three Judges against *Wyndham* in the Case of *Wiseman* and *Cotton*, *the special Customs of Kent are no Part of the Custom of Gavelkind, for that the Custom of Gavelkind, is in other Countries and Towns, as Ireland, Wales, and many Towns in Suffex, scarce two of which Places agree in any other Custom but that of the Descent*, 1 Sid. 138. 1 Lev. 80. But the Authorities just above cited sufficiently shew that the special Customs have always been reputed Part of the Custom of Gavelkind. And with regard to the latter Part of this Position that Gavelkind is in other Countries, it is remarkable that although the Name of Gavelkind has been constantly applied to *Kentish* Lands from the Time of King *John* to the present, no Book or Record before the Time of the disgavelling Statute 31 H. 8. (on which the Question in this Case of *Wiseman* and *Cotton* depended) has given that Denomination to partible Lands in any other Country, tho' many Cases occur

The Word may possibly occur in the following Parts of this Treatise in each of these several

cur concerning such Lands ; but their uniform Language with regard to these is only, *that they are partible and have been parted*. Vide Stat. Wallia 12 Ed. 1. Stat. 27 H. 8. 26. concerning *Wales*, sect. 35. Stat. 32 H. 8. 29. Itin. Rotel. 14 Ed. 1. rot. 2. in dorso. Rex. Hill. 20 Ed. 3. R. R. rot. 160. Fitz. Prescription, 53. 2 Ed. 3. 12. 3 Ed. 3. 38. 5 Ed. 3. 64. 8 Ed. 3. 42. b. 9 Ed. 3. 14. b. ibid. 27. ibid. 40. b. 23 Aff. pl. 12. 38 Ed. 3. 22. b. Which universal Conformity of the Books and Records in applying the Term to *Kentish Lands*, but never to make use of it as to any others, could hardly have arisen from Chance, 53. V. Somn. 10. were the Name equally proper to both. Some of the Cases go still farther and make a plain Distinction between such partible Lands in other Countries and Gavelkind : As *Bracton*, lib. 3. 374. a. *sicut in Gavelkynde vel alibi ubi terra est partibilis ratione terræ*. And the same Expression in *Fleta*, lib. 6. c. 17. And in *Ralph de Colby's Case*, 2 Ed. 3. 12. concerning Lands of the Fee of the *Marshall* in *Norfolk* alledged to be partible, it is said that in *Gavelkind* it is not necessary to shew an actual Partition of the Lands, because in *Gavelkind* the Tenements are partible by Usage of the Country, but the Fee of the *Marshall* is only in certain Towns, where the greater Part of the Country is at the Common Law, and therefore necessary to shew that the Lands had been actually parted. So in 5 Ed. 3. 64. a. it is said concerning Lands of the Fee of *Gelfy*, pleaded to be partible among the Males, that it is not of these Tenements as of Tenements in *Gavelkind*, for in *Gavelkind* of common Right the Tenements are partible. And in 8 Ed. 3. 42 b. concerning Lands of the like Nature in *Saxham* in *Suffolk*, it is held necessary to shew between whom they had been parted, for that you cannot draw the Tenements out of the common Course of Law, if you cannot shew between whom it was so used, unless you can alledge the Usage of the whole Country as in *Gavelkind*. These Observations impeach not the Authority of the Case of *Wiseman* and *Cotton*,

Book I.  several Senses, according as the Tenure, the Customs of *Kent*, or the Partibility of Lands in other Countries are the Subject of the Discourse, but still with due Care to avoid all Confusion or Mistakes of the Meaning.

Cotton in the Point adjudged, for the whole Court agreed, that if the special Customs of *Kent* are Part of V. inf. lib. 1. Gavelkind, yet they are not affected by the disgaveling Statutes.
c. 5.

C H A P. II.

Of the Origin, Antiquity, and Universality of partible Descents.

MOST of the Customs of this Kingdom variant from the Common Law are founded on some particular Points of Convenience peculiar to the few Places wherein they obtain; but that which is the Subject of the present Treatise lays claim to a more noble Original, being derived from the Universal Law of the whole World; for anciently all the Children being equally near in Blood, and entitled to the same Affection and Support from their Parents, partook alike of the Possessions descending from them, till the more refined Policy of later Ages found it useful, or, as some may think, necessary to raise Distinctions where Nature made none.

Before I enter into a particular Consideration of the *Kentish* Custom, it may be proper for the better ascertaining the Origin of *Gavelkind* to take a short View of the partible Descents in other Nations, and from thence to deduce the Discourse to our own Country, and our own Times.

The Descent or Succession among God's own People the *Jews* was to all the Sons, only the eldest had in Favour of his Primogeniture, as being the Beginning of his Father's Strength, (*Deut. xxi. 15.*) a double Portion to any of the rest. And if such First-born Son died in his Father's Life-time, this double

Gavelkind
anciently universal.
Spelman of Feuds 43.
V. Seld. Janus Anglor. c. 7.
Locke against Filmer, Part 1. Sect. 87, 88, 89.

Jews.
Hale's Hist. Com. Law
208, 209, 210.
Seld. de Success. Hæbr. c. 5, 6, 7, 8, 12, 13.
Luke xii. 13.
Por- and xv. 12.

Of the Antiquity and

Portion was divided among his Representatives.

But the double Share of the Eldest was confined to the Paternal Possessions; for the Inheritance of the Mother was divided among the Sons, as was the Grandfather's Estate among the Grandsons, in equal Proportions without any such Preference.

The Females did not succeed (except as Representatives of a Male) in the Inheritance of the Father, as long as there were Sons, or any Descendants from Sons in Being: But if the Father left only Daughters, and no Sons, they succeeded equally to their Father, as in Coparcenary, without any Preference of the Eldest to a double Portion. *Numb. c. xxvii.* But they took upon Condition not to marry except to one of their own Tribe. *Numb. c. xxxvi.*

In like Manner among Collaterals the Descent was to all the Brothers without any double Portion to the eldest, for this only took Place in that Person who was the first Born of him from whom the Inheritance immediately descended, or his Representatives.

Greeks.

In Greece all the legitimate Sons were equally Heirs to the Father; but if a Man had no Sons, then the Inheritance was to the Husbands of his Daughters; and if he had no Children, then to his Brothers and their Children: And if none of them, then to his next Kindred, the Males being preferred to the Females, and those on the Father's Side down to second Cousins to those on the Part of the Mother. *Petit's Leges Atticæ, c. 1. tit. 6. De Testamentis & Hereditario Jure.* Hale's *Hist. of the Common Law* 211. Potter's *Antiq.* 1 Vol. 174. By

Universality of Partible Descents.

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By the Law of the Twelve Tables the Descent in the Right Line was without Distinction of Primogeniture to all the Children, whether Male or Female, natural or adopted, who remained under the Power of the Father unemancipated at the Time of his Death: And in Case a Son was dead or emancipated, his Sons and Daughters came into the Place of their Father by Right of Representation: And all these were termed *sui Heredes*; but the Grandchildren by Daughters succeeded not in the Place of their dead Mothers, till admitted by the more favourable Constitutions of later Emperors.

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Romans.

Just. Inst.

lib. 3. tit. 1.

Just. Nov.

118. c. 1.

Nor were emancipated Children esteemed as Part of the Family with regard to the Inheritance, till in later Times the Equity of the *Prætor* mitigated the Rigour of the Law, by admitting them to the same Share of their Father's Goods, as they would have been entitled to had they remained *sui Heredes*.

Just. Inst. lib.

3. tit. 1. par.

9. & 14.

In the Collateral Line, the Law of the Twelve Tables divided the Inheritance amongst the next of Kin * deriving their Descent through Males, entirely excluding from the Succession † those, who could not make out their Kindred without the Interposition of a Female Parent. But this Hardship on the Descendants of Females was afterwards in some Measure moderated by the *Prætor*, who admitted them to partake of the Inheritance in Default of Descendants by Males; and at last *Justinian* by his 118th Novel Constitution took away all Distinction between the *Agnati* and *Cognati*, admitting

Just. Inst. lib.

3. tit. 2 & 5.

* *Agnati*.

† *Cognati*.

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both Sexes to take indiscriminately according to Proximity of Blood; but extending the Right of Representation no further than to Brothers and Sisters Children.

Modern Italy. Inheritances in *Italy* remain partible among the Males to this Day: Nor is this confined to Lands only, but even to the lesser Dignities all the Sons succeed; as if a Count has twenty Sons, every one of them is called Count, and the youngest has an equal Part of his Father's Lands and Goods with the eldest: It is otherwise indeed as to the Estates and Titles of Sovereign Princes.

Germany. Among the old *Germans* the Children inherited equally, as appears by *Tacitus de Moribus German'*: *Hæredes Successoresq; sui cuiq; Liberi, & nullum Testamentum. Si liberi non sunt, proximus Gradus in Possessione Fratres, Patruī, Avunculi.* And this Partible Course of Descent still obtains there by the Name of *Landscheutan*, or, as it is commonly written, *Landskiftan*. Which Word our *Saxon* Ancestors introduced into this Kingdom; and from thence is derived the *Kentish Term* to shift Land. *Lamb. Gloss. to the Saxon Laws verbo Terra ex scripto. Lamb. Peramb. 529.*

Feudal Law. It is to the *Feudal Law* that the Elder Brothers are obliged for the Establishment of their exclusive Right to the Descent, in the Countries where it now prevails; yet originally even by this Law in all Feuds whatsoever, proper or military as well as others, the Course of Succession was to all the Sons, exclusive of the Daughters, and to them equally; until by the Constitution of the Emperor *Frederick* honorary Feuds became indivisible, and

Consuet. Feudorum lib. 1. tit. 3 & 8. lib. 2. tit. 11. Spelm. Gloss. sub verbo Feudum,

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and as such, they, and in Imitation of them military Feuds in most Countries began to descend to the eldest Son only." *Wright's Treatise on Tenures*, f. 31. and see the same Book fol. 175.

The Lands in *Normandy* are of two Kinds, *France*. some partible in Point of Descent, and others not partible; the Lands that are partible are *Valvasories*, *Burgages*, and such like, which are much of the Nature of our Socage Lands: These descend to all the Sons, or in their Default to all the Daughters: Lands not partible are *Fiefs de Haubert* and *Dignities*; these descend to the eldest Son, and not to all the Sons; but if there be no Sons, then to all the Daughters and become partible. *Grand Coutumier de Normandy*, c. 26. fol. 41. b. *Hale's Hist. of the Common Law* 215.

And as in *Normandy*, so I believe generally throughout the other Provinces of *France*, tho' their *Fiefs de Haubert*, or Lands holden *per Servitium Loricæ* may be descendible to the Eldest, yet their *Fiefs de Roturier*, the Husbandman's or Plowman's Fees are divisible among all the Sons. And so it is in the very Metropolis of that Kingdom. *Tayl. on Gall. velk. 95.*

Vide Choppin. de Moribus Parisior. p. 316. Somn. 147.

And now after this short Account of Partible Successions in other Countries, I shall take a Survey of the *British* Dominions, and shew how universally this Manner of Descent formerly obtained in the several Parts thereof, and the Reason of its Discontinuance in most of them.

I shall

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I shall first begin with the Countries that have always been Strangers to the Common Law of *England*.

Jersey.

By the Custom of the Island of *Jersey* Estates both real and personal are equally divided among the Sons and Daughters. *Falle's Account of Jersey*, pag. 85.

Scotland.

Whether the Preamble of the Stat. 1 *Jac.* 1. c. 1. reciting that *England* and *Scotland* were antiently but one Kingdom, be true or not; it is certain there was formerly a wonderful Conformity between their Laws, as appears by the old Book called *Regiam Majestatem*, which, as it in Substance agrees with our *Glanville*, and most commonly Word for Word, so it informs us, that much of the Socage Lands in *Scotland* were partible among the Males; and for that Purpose makes use of the very Words of *Glanville* cited *infra* p. 27. *Si fuerit liber Sockmannus, tunc quidem dividetur Hæreditas inter omnes filios, si fuerit Socagium & id antiquitus divisum, &c.*

Ireland.

Though *Ireland* was by the Ordinance of King *John* reduced under the Laws of the conquering Country, yet did they retain many of their ancient Customs, and amongst the rest, this of Partition: But the Custom as it was there used being of a very particular Nature, and different in some respects from what we meet with in almost any other Country, I shall here insert the Account given of it by Sir *John Davis* in his Report of this *Irish* Custom, fol. 49.

Vid. Dav.

37. b.

Spelm. Gloss.

Voce Gaveletum.

The Lands in that Kingdom possessed by the mere *Irish* were divided into several Territories or Countries, and the Inhabitants of every

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every *Irish* Country were divided into several *Septs* or Lineages, in every one of which there was a Chief called *Canfinny*, or *Caput Cognationis* [the Head of the Clan] and all the * inferior Tenancies in these *Irish* Territories were partible among the Males in Gavelkind; but the Estate which these inferior Tenants had in Gavelkind was not an Estate of Inheritance, but a temporary or transitory Possession; for these Lands of the Nature of Gavelkind were not partible among the next Heirs Males of him that died, but among all the Males of this Sept or Clan, in this Manner: The *Canfinny* or Chief of the *Sept* (who was generally the oldest Man in the *Sept*) made all these Partitions according to his Discretion. This *Canfinny* after the Death of every Terre-tenant, who had a competent Portion of Land, assembled all the *Sept* or Clan, and having put all their Possessions in Hotchpot made a new Partition of the Whole; in which Partition he did not assign to the Sons of him, that was dead, the Share that their Father had, but he allotted to every one of the Sept according to his Age a better or larger Purparty.

These

* But every *Seigniory* or *Chieftry* in these Countries, together with the Portion of Lands which passed with it, were of the Nature and Tenure of *Tanistry*, the Custom of which was that Castles, Manors, Lands, &c. of that Nature used to descend *Seniori & dignissimo viro sanguinis & Cognominis* of the Person dying seised: And that the Daughters of such Person so dying seised were not inheritable. Which Custom was 5 Jac. 1. held unreasonable and void. *The Case of the Tanistry, Davis* 29.

Of the Antiquity and

These Shares or Purparties being so allotted and assigned, were possessed and enjoyed accordingly till a new Partition was made, which at the Discretion or Will of the *Cannery* might be on the Death of any inferior Tenant. And so by reason of these frequent Partitions, and Translations of the Tenants from one Share to another, all the Possessions were uncertain; and this Uncertainty was the Cause that no Civil-Habitations were erected, nor any Inclosure or Improvement made of Lands in the *Irish* Countries where this Custom of Gavelkind was in use.

Nor did this Custom differ from the *Kentish* Gavelkind only in the Manner of Partition, but likewise in three other Points. 1. By this *Irish* Custom of Gavelkind Bastards had their Purparties as well as legitimate Children: 2. * Daughters were not inheritable, tho' their Father died without Issue

* This Exclusion of the Heirs Females was likewise held unreasonable and void in the Custom of the *Tanistry*, as being against the Nature of Fee-simple. *Dav.* 34. But in *England* a Custom of a *Copyhold* Manor, that if a Man should die leaving no Son, and two or more Daughters, the eldest Daughter should have the Copyhold Land for her Life only, and after her Death it should descend to the next Heir Male, who could derive his Descent thro' Males, and in Default of such it should escheat to the Lord, has been held good. *Newton* and *Shafte*, 1 Lev. 172. 1 Sid. 267. *Simpson* and *Quinley*, 1 Vent. 88. 1 Lev. 293. 2 Keb. 672. for the Estate being created by the Custom, the Custom may modify it: But it is said, 1 Sid. 267. to have been admitted by all, that this Custom claimed to have been annexed to Lands in Fee at Common Law would have been void and unreasonable, it being against the Nature of the Fee to escheat as long as there are Heirs.

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due Male. 3. Wives were utterly excluded from Dower.

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And on Account of all these four Differences all the Judges of *Ireland*, *Hill. 3 Jac. 1.* resolved and declared that this *Irish* Custom of Gavelkind was void in Law; not only for the Inconvenience and Unreasonableness of it, but likewise because it was a mere personal Custom, and could not alter the Descent of the Inheritance: And therefore all the Lands in these *Irish* Territories were adjudged to be descendible according to the Course of the Common Law, and that the Wives should be endowed, and the Daughters become inheritable of these Lands, notwithstanding the *Irish* Usage.

Thus was the *Irish* Custom of Gavelkind (as it was improperly called) utterly abolished: But by a late Statute in that Kingdom, in order to weaken the Interest of *Papists* there, the Lands of Persons of the *Romish* Persuasion are made descendible in Gavelkind, unless the eldest Son conform to the Protestant Religion, &c. within a particular Time limited by the Act.

Irish Stat.
2 Ann. c. 6.
1. 12. But this
is altered again
by 7 Geo. 4. c. 49.
s. 1.

It now remains to treat of the Antiquity of the partible Descent within the Realm of *England*, and to shew the several Alterations that in Process of Time it has received.

I shall not depend on the Story of *Brute's Britons*.

dividing this Island among his three Sons, *Geoffry* of *Monmouth*.
by allotting *England* to *Lochrine*, *Wales* to *Enderbie's*
Camber, and *Scotland* to *Albanact*, as an Evi-

D

dence *Cambria Tri-*
umphans, f. 10.
Milit. Hist. Eng.

Plow. 129. b. It is said by *Brooke Ch. J.* that the Law of the Britons divided the Inheritance, and Divisions of the Kingdom twice made between Brothers are there mentioned. *V. Seld. Janus Anglor. c. 7. Hale's Hist. Com. Law 218.*

Welsh.

Powell's
Welch Hist.
Edit. 1697.
pag. 22.
Enderbie's
Cambria Tri-
umphans, fol.
218.
Powell's
Welch Hist.
22.

dence of the Custom of Partition among the ancient *Britons*, nor indeed on any other Account of their Laws before their Expulsion into *Wales*, we having little Authentick concerning them; but the general Observance of this Manner of Descent among the *Welsh* so religiously tenacious of the Laws and Usages of their Forefathers, will sufficiently prove it to have been the ancient *British* Law; and that not only as to ordinary Inheritances, (which is the Opinion of Sir *Matth. Hale* in his *History of the Common Law* 218.) but as to Titles and Dignities too, and the Jurisdictions annexed to them: for it appears by the Pedigree of *Roderick* the Great, Prince of all *Wales*, set out in *Taylor* on *Gavelkind* fol. 25, and said to have been drawn by an ancient Bard, and by several other Instances in the *Welsh History*, that the Principality of that Country was divided amongst all the Sons of the Prince, and afterwards became subject to other Subdivisions on the Death of a Parcener having more Sons than one.

The *Welsh* Custom of Partition was different from the *Kentish*, and agreeable to the *Irish* in three of the Particulars holden, as is said above, by the Judges of *Ireland* to have been unreasonable. 1. Bastards inherited equally with the Legitimate Sons; and that even in the Principality itself, as appears by an Instance in the abovementioned Pedigree. *Tayl.* 26. 2. Daughters never inherited. 3. Women were not entitled to Dower. And this Correspondence of the two Customs confirms the Opinion of Lord

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Coke, 1 Inst. 175. b. That Gavelkind among the *Irish* was one Mark of the ancient Britons.

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However the *Welsh* Custom was not on these Accounts entirely abolished, but only rectified by * *Statutum Walliæ*, in those * 12 Ed. 1. Points which wanted Amendment, and confirmed as to the reasonable Part.

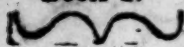
‘ Quia aliter usitatum est in *Walliâ* quam
‘ in *Angliâ* quoad Successionem Hæreditatis,
‘ èo quod Hæreditas partibilis est inter Hæ-
‘ redes masculos, & a tempore cujus non ex-
‘ titerit memoria, partibilis extitit, Dominus
‘ Rex non vult quod Consuetudo illa abro-
‘ getur, sed quod Hæreditates remaneant
‘ partibiles inter consimiles Hæredes, sicut
‘ esse consueverunt, & fiat Partitio illius si-
‘ cut fieri consuevit, Hoc excepto quod
‘ *Bastardi non habeant de cætero Hæreditates*,
‘ *Et etiam quod non habeant purpartes cum le-*
‘ *gitimis nec sine legitimis.*

‘ Et si forte Hæreditas aliqua extunc pro
‘ defectu hæredis masculi descendat ad legi-
‘ timas mulieres hæredes ultimi antecessoris
‘ sui inde seifiti, Volumus de gratiâ nostrâ
‘ speciali quod eodem modo mulieres legitimæ
‘ habeant purpartes suas inde sibi in Curiâ
‘ nostrâ assignatas, licet hoc sit contra Consue-
‘ tudinem *Wallensicam* ante usitatam.

D 2

And

* Printed in the old Magna Charta. Rot. Parl. 12 Ed. 1. 2 Inst. 195. Vaugh. 400, 414. Plow. 126. b. Calvin's Case, 7 Rep. 21. b. Hale's Hist. Com. Law 218, All take Notice of this as an Act of Parliament.



And a little higher, *Quia mulieres hactenus non extiterant Dotatæ, Rex concedit quod do-*
tentur.

Under these Alterations the Custom of Partition still prevailed in the Dominion of *Wales*; and was confirmed, on a further Declaration of the Union of that Principality with the Realm of *England*, by 27 *H. 8.* 26, 35. But was soon after entirely taken away by 34 & 35 *H. 8.* 26, 91. whereby all Manors, Lands, Tenements, Messuages, and other Hereditaments, and all Rights and Titles to the same in any of the Shires of *Wales* are to be taken, enjoyed, used, and holden as *English* Tenure to all Intents according to the Common Laws of this Realm of *England*, and not to be partible amongst Heirs Male after the Custom of *Gavelkind*, as heretofore in divers Parts of *Wales* was used and accustomed. And the 128th Section of this Act is to the same Purpose.

Saxons.
Hale's Hist.
Com. Law
219.

* The Laws of the *Saxons* and *Danes*, collected by *Brompton* and *Lambard* speak not much concerning the Manner of Descents among them; yet it seems that commonly their ordinary Lands at least descended to all the Children; for amongst the

* *Hæreditatem temporibus illis non (quemadmodum apud nos) solus ætate maximus adibat, verum ad filios omnes æqualiter fundus lege veniebat, quod illi Landesciftan dixerunt, & Cantii hæc nostra memoria eodem vocabulo to shift Land, id est herciscere & fundum partiri, appellant. Lamb's Gloss. to the Saxon Laws, verbo terra ex scripto. Vide Somn. 77. Spelm. of Feuds 12, 40, 43.*

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the Laws of *Canute* is this Law, N^o. 68.

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*Sive quis incuriâ sive morte repentinâ fuerit intestatò mortuus, Dominus tamen nullam * rerum suarum partem (præter eam quæ jure debetur Hæreoti nomine) sibi assumito: verum eas judicio suo uxori, Liberis & Cognatione proximis juste, pro suo cuiq; jure, distribuito.*

Parker Ant.
Eccl. Brit. 108.
Holt in 6
Mod. 121.
1 Peere Wil.
63. Clement
& Scudamore.

The same Inference may be made from the 75th Law of the same King, whereby it was enacted, that if a Man died fighting in the Army, in the Presence of his Lord, his Heriot should be forgiven, and his Heirs should succeed in his Goods and his paternal Lands, and they should be *shifted* or *divided* according to Right.

Tayl. on Gavellk. 143.
Lamb. Sax.
Laws 125.
Seld. Orig. of
the Eccl. Jurisd. of Testaments.

And it is the Opinion of Lord *Holt*, in Salk. 251. the Case of *Blackborough* and *Davis*, that by the Common Law both before and at the Conquest, all the Children both Male and Female inherited as well the real as personal Estate of the Ancestor equally and in like Proportion.

Which

* The Saxon Word *Æhte* comprehends both Lands and Goods. Somn. 84. For at that Time, as appears by the 75th Law of *Canute* here cited, the Heirs took both; our present Distinction between the real and personal Estate in Point of Descent not being then known, nor indeed any where (as it seems) till after the Introduction of Feudal Tenures. Mr. *Selden* collects from the Laws of *Hen. 1.* and the Assise of *Clarendon*, that in this Kingdom the Heirs inherited Chattels as well as Lands, as late as the Times of *Hen. 1.* and 2. and that the Law was changed about the Time of King *John* by some Act of Parliament, tho' no such is now to be found. *Titles of Honour*, 2 Part, chap. 5. sect. 21.

Which Authorities may be sufficient to guard us against the Mistake of *Brooke Ch.* Just. in *Plow.* 129. *b.* that among the *Saxons* the Law was, that the Eldest alone should inherit, and that this Manner of Descent is continued from them to us.

Of the State
of Descents at
the Conquest.

As the Laws of *Normandy* divided Socage Lands among the Sons, the Conquest introduced no considerable Alteration in the general Law of the Land with regard to Inheritances of this Nature; but on the contrary this Course of Descent stands confirmed by a Law of the Conqueror. *Siquis intestatus obierit, Liberi ejus Hereditatem equaliter dividant.* Leg. 36. *Lamb. Sax. Laws*, fol. 167. *Seld. in Eadmerum* 184. *Somm.* 83. *Hale's Hist. of the Common Law* 220.

Right of Primogeniture
how first introduced into
England.

Hale's Hist. Com. Law
221, 222, 223.
6 Mod. 120.
Clement and Scudamore.
2 Inst. 595.
Wright's Tenures 175.

The Right of Primogeniture first gained Footing in this Nation by the Introduction of Military Tenures; it being convenient for the Service of the Kingdom to preserve the Fee entire, to the Intent that the Tenant by Knight Service, who by his Tenure was to attend the King in his Wars, might do it with more Dignity and Grandeur; and the Choice fell on the eldest Son, as he was soonest able to perform the Duties of the Fee.

It will be impossible to settle the Period of this Change with Regard to Knight-service Lands, till the Antiquaries are agreed, whether our Military Tenures were in use with the *Saxons*, or were first introduced amongst us by the Conqueror.

But

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But however this be, it seems certain that Socage Lands remained partible long after the Conquest; tho' indeed we have no exact Account of the precise Time of the general Alteration of Descents with Regard to these Lands throughout the Kingdom: but from the Silence of Historians it may be concluded that it was not effected at once, nor by any written Law; but seems to have crept in insensibly, and by Degrees, in Imitation of the Descents of Knight-service Lands; the Owners of Socage Tenements chusing rather to deprive their younger Sons of their Customary Share of the Inheritance, than that their elder should not be in a Condition to emulate the State and Grandeur of the military Tenants.

And some Inconveniences suggested to have arisen from the equal Division of Inheritances among the Sons are supposed to have assisted this Change.

“ 1st, It weakened the Strength of the Kingdom; for by the frequent parcelling and subdividing of Inheritances, in Process of Time they became so divided and crumbled, that there were few Persons of able Estates left to undergo publick Offices and Charges.”

V. Charter
Ed. 1. post
chap. 5.

“ 2^{dly}, It did by Degrees bring the Inhabitants to a low Kind of Country-living, and Families were broken; and the younger Sons, who, had they not had these little Parcels of Land to apply themselves to, would have betaken themselves to Trades or to Civil, Military, or Ecclesiastical Employments, neglecting those

“ Op-

Book I.

“ Opportunities wholly applied themselves
 “ to those small Divisions of Lands, where-
 “ by they neglected the Opportunity of
 “ greater Advantages of enriching them-
 “ selves and the Kingdom.” *Hale’s Hist. of
 the Com. Law* 221.

Hen. 1.
Blackborough
and Davis,
Salk. 251.
1 Peere Wil.
50.

In the Reign of *Henry I.* according to the Opinion of *Lord Holt*, the Females, in case there were Males, began to be excluded from the real Estate ; but the Males still inherited equally the Socage Land. Indeed *Lord Hale* collects from the 70th Law of that King, *Primum Patris Feodum primogenitus filius habet*, that tho’ the whole Land did not descend to the eldest Son, yet it began to look a little that way. *Hist. of Com. Law* 224. But *Mr. Somner* in his Comment on this Law of *Hen. 1.* printed in *Wilkins’s Saxons Laws*, pag. 226. interprets the *Primum Feodum* to be only the *Capital Messuage* according to *Glanville*, lib. 7. c. 3. (*infra*) or what is called in the *Grand Custumier de Normandy*, c. 26. *Le Chief de Heritage*, for which the younger Sons were to have an equivalent out of the rest of the Inheritance.

Hen. 2.

But the Alteration began to appear more plainly in the Time of *Henry 2.* for according to *Glanville*, who wrote in that Reign, in order to entitle the Sons to take equally, it was necessary not only that the Land should be holden in free Socage, but further *quod sit antiquitus divisum*. The whole Passage is this.

‘ Si plures reliquerit filios, tunc distingui-
 ‘ tur utrum ille fuerit miles seu per Feodum
 ‘ militare tenens, an liber Sockmannus. Quia
 ‘ si

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‘ si Miles fuerit vel per Militiam Tenens,
‘ tunc secundum Jus Regni Angliæ primo-
‘ genitus filius Patri succedit in totum, ita
‘ quod nullus fratrum suorum partem inde
‘ de jure petere potest. Si vero fuerit liber
‘ Sokemannus, tunc quidem dividetur Hære-
‘ ditas inter omnes filios, quotquot sunt, per
‘ partes æquales, si fuerit Socagium & id
‘ antiquitus divisum: Salvo tamen capitali
‘ Messuagio primogenito filio pro dignitate
‘ Æsneiciæ suæ, ita tamen quod in aliis re-
‘ bus satisfaciatur aliis ad valentiam. Si vero
‘ non fuerit antiquitus divisum, tunc primo-
‘ genitus secundum quorundam Consuetudi-
‘ nem totam Hæreditatem obtinebit: Se-
‘ cundum autem quorundam Consuetudinem
‘ postnatus filius hæres est. *Glarv. lib. 7. c. 3.*

So that according to this Account it is difficult to say, what was then the Common Law with regard to Descents of Socage Lands, or whether every Person entitling himself to them by Inheritance, was not obliged to set out the special Custom of the Place. The same Author indeed, in other Parts of his Book, speaks of the Partibility of these Lands more generally, and in such a Manner as may induce a Belief that it remained the Common Law at that Time:

Plurimum item hæredum Conjunctio, mulierum scilicet in feodo militari, vel masculorum vel fæminarum in libero Socagio. Lib. 13. c. 11.

And in another very remarkable Passage; wherein he shews that the Law so greatly respected this equal Division among the Sons, as not to permit the Father, even in his Lifetime, to prefer a favourite Child to any of

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the

Book. I.

the rest by advancing him beyond his proportionable Part : Sciendum autem, quod si quis liberum habens socagium plures reliquerit filios, qui omnes ad hæreditatem æqualiter pro æqualibus proportionibus sunt admittendi, tunc indistinctè verum est quod pater eorum nihil de hæreditate, vel de quæstu, si nullam habuerit hæreditatem, alicui filiorum, quod excedat rationabilem partem suam, quæ ei contingit de totâ hæreditate paternâ, donare poterit. Sed tantum donare poterit de hæreditate suâ pater cuilibet filiorum suorum de libero socagio in vitâ suâ, quantum jure successionis post mortem patris idem consecutus esset de eadem hæreditate. *Lib. 7. c. 1.*

Rich. 1.

Nothing can be affirmed with any tolerable Certainty concerning the Manner of Descents in the Reign of *Richard 1.* there remaining little of the Judicial Records, or other Memorials of the Law in his Time. But it is plain that the Right of Primogeniture made every Day a greater Progress, in so much that in the following Reign of King *John*, it had fairly got the upper Hand of the partible Descent ; which, tho' not then so entirely discontinued in most Parts of the Kingdom as at present, yet did not remain the general Law of the Land as it had formerly been ; but the Presumption of Law then was, as now, that even Socage Lands, (except in *Kent*) were descendible to the Eldest Son only, unless it were proved that they had always been departible ; for in *Mich. 2 John* (*rot. 7. in dorso*) *Gilbert de Beville* brought a Writ of Right *de Rationabili Parte*

King *John*.

• **Universality of Partible Descents.**

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Parte * against William his Elder Brother for Lands in Gunthorpe in Rutlandshire, *quæ cum contingunt de Socagio quod fuit Patris eorum in eadem Villâ*, William pleaded, *Quod Socagium illud nunquam partitum fuit nec debet partiri, & hoc offert defendere*. And because Gilbert the Demandant produced no Proof of the Partibility, *Consideratum est quod Will'us eat sine die, &c.*

And the partible Lands in Kent stand distinguished from those at the Common Law by their present Name of Gavelkind in *Pas. 9 Job. rot. 7. Kanc.* Where in Assise William de Valon the Tenant pleads in Abatement, *quod dimidia illa Carucata terræ est partibilis & Gavelykinde, & unde Johannes* (the Plaintiff) *fratrem habet nomine Thomam qui tale & idem Jus habet, &c.* And the like Pleading occurs in *Pasch. 4 Job. rot. 6. in dorso, Kanc.*

And this Change of the Law is further apparent by *Bracton*, who wrote in the latter End of the Reign of *Hen. 3.* ‘ Si liber Sock-
‘ mannus moriatur pluribus relictis Hæredi-
‘ bus & Participibus, si *Hæreditas partibi-*
‘ *lis sit & ab antiquo divisa*, quotquot erunt,
‘ habeant partes suas æquales; & si unicum
‘ fuerit Messuagium, illud integre rema-
‘ neat Primogenito, ita tamen quod alii ha-
‘ beant ad Valentiam de communi. Si au-
‘ tem *Hæreditas non fuerit divisa ab antiquo*,
E 2 “ *tunc*

* This Case is misprinted in Hale's Hist. of Com. Law 153. The Words Demandant and Defendant being transposed.

Book I.

‘ *tunc tota remaneat primogenito.* Si autem
 ‘ Socagium fuerit Villanum, tunc Consue-
 ‘ tudo loci est observanda; est enim Con-
 ‘ suetudo in quibusdam partibus quod postna-
 ‘ tus præferatur primogenito, & e contrario.
Bract. lib. 2. fol. 76. And *Fleta, lib. 5. c. 9.*
fol. 313, copies, as usual, almost the very
 Words of *Bracton*.

And it appears by the Statute of *Wales* abovementioned, that the Common Law of Descents was in this particular the same in 12 *Ed. 1.* as it is at present. *Aliter usitatum est in Walliâ quam in Angliâ quoad Successionem Hereditatis eo quod hereditas partibilis est inter heredes masculos, &c.*

The Reason
 of the Con-
 tinuance of
 Gavelkind in
Kent.

Having thus pursued the Partition of the Inheritance from its first Original to the Discontinuation of it in most Parts of the Kingdom, my next Enquiry shall be, how it came to pass, that, notwithstanding this general Alteration of the Course of Descents, the County of *Kent* disregarding the Example of her Neighbours, still adheres to the old Common Law, by retaining the partible Descent.

And it is much more easy to lay down negatively what was not the Cause of this, than affirmatively what is; it being plain, that the Continuance of this Custom in *Kent* stands not in need of a Confirmation from the Conqueror, since it was in his Time the Common Law of the Kingdom, as appears by his 36th Law abovementioned: But it is more difficult to assign the true Cause; Mr. *Somner* finds it easier to refute the fabulous Story of the *Kentish* Mens Composition for
 their

their Privileges with the Conqueror, by Means of the Surprize of the Moving Wood of *Swanscombe*, than to give another Account in Lieu of that which he has destroyed; confessing that his Answer must be but conjectural, neither Historians nor Records giving Light into this Matter: But however as his Supposition seems to be the most probable, I shall insert it here.

“ The *Kentish* Men, more careful in those Days to maintain their Issue for the present, than their Houses for the future, were more tenacious, tender, and retentive of the present Custom, and more careful to continue it, than generally those of most other Shires were; not because, Lit. sect. 210. as some give the Reason, the younger be as good Gentlemen as the elder Brethren; (an Argument proper perchance for the partible Land in *Wales*) but because it was Land which by the Nature of it appertained not to the Gentry, but to the Yeomanry, whose Name or House they cared not much to uphold by keeping the Inheritance to the elder Brother.” *Somn.* 89, 90. And this Account agrees well with the Genius and Temper of the People, who, as Mr. *Lambard* observes, “ in this their Estate please themselves, and joy exceedingly; insomuch as a Man may find sundry *Yeomen* (although otherwise for Wealth comparable with many of the Gentle Sort) that will not for all that change their Condition, nor desire to be apparelled with the Titles of Gentry. *Lamb. Peramb.* 9.

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The Antiquaries indeed are not unanimous in this Account of the Origin of our Custom, some affirming it to be of foreign Growth, and introduced here by the Saxons, and by them derived from the old Germans. *Verstegan's Restitution of decayed Intelligence* 57. *Lamb. Gloss. Verbo Terra ex scripto.* *Lamb. Peramb.* § 11. *Somn.* 77, 163. *Spelm. Gloss. Verba Gaveletum.* *Philipot's Villare Cantiarum* 3. But if it is already sufficiently shewn that Lands were generally partible by the Original Law of this, as well as of other Nations, it is plain that the Saxons can only claim the Merit of continuing the ancient Course of Descents. And it is much to be doubted whether the Law of Inheritances among the Saxons was derived from what *Tacitus* mentions to have been the Usage of the antient Germans; for as the Restriction of *Nullum Testamentum* is no Mark of the Modern Gavelkind, so it is directly contrary to the Saxon Law, whose *Allodium* or *Bockland* was beyond all Controversy deviseable by Will, and therefore termed *Terra Testamentolis*.

Mr. *Lambard* in his *Perambulation* § 11 raises another Supposition concerning the Introduction of this partible Course of Descent into the County of *Kent* entirely inconsistent with, and, as it seems, built on a slighter Foundation than either of the former, viz. That we received it from the Custom of *Normandy*, by the Delivery of *Odo Bishop of Bayeux*, *Earl of Kent*, and Bastard Brother to the Conqueror. Which Opinion Mr. *Sommer* refutes by observing, that had this Custom been transplanted from *Normandy*, it would not

Post. lib. 2. c. 5.

Somn. 84.
Post. lib. 2.
c. 5.

p. 81.

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not have been confined to *Kent*, a Corner only of the Kingdom, but have spread itself over the whole by the Conqueror's Means; whose Inclination and Endeavours to implant the Customs of his own Country are too notorious to be doubted of.

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Mr. *Calthrop* has given still a different Reason for the Prevalence of the partible Descent in *Kent* and *North Wales*; that these Countries having been more subject to foreign Invasions, the Inheritance for the most part descends in Gavelkind, that every Man there may be of Power for Resistance. But it is a little unfortunate for this Conjecture, that the Lands in *Kent* more peculiarly appropriated to the Defence of the Country by their Subjection to Military Services, are the only Lands in the County originally exempt from the Controul of the Custom.

Reading on
Copyhold, p.
18.

This, I think, may suffice concerning the Origin of our Custom with respect to the Quality of Partition: And the Notion that it is the Remains of the old Common Law is further supported by this, that several of the special Customs of *Kent* evidently spring from the same Source; as shall be observed hereafter under their several Heads.

Post. lib. 2. c.
1, 2, 3, 4, 5, 6.

Having dwelt thus long on the Etymology and Antiquity of Gavelkind, it is high Time to pass over to that, which is of more real Use, the Law of the Custom as observed at this Day.

CHAP.

C H A P. III.

In what Places within this Realm
the Custom of Gavelkind may be
alledged and maintained.

IN discussing of the Matter of this Chapter it will be necessary to use the Word *Gavelkind* in the modern Signification, as a synonymous Term for the *Custom of Partition*: And taking it for granted that Gavelkind may properly exist out of the County of *Kent*, let us see where the Law will suffer it to be set up.

Where the
Custom may
supported.

Braet. f. 374.
a.

And first, a Personal Prescription to have Lands descend according the Manner of Gavelkind is not good. *Somn.* 44, 46. For Sons are Parceners in respect of the Custom of the Fee or Inheritance, and not in respect of their Persons. *Co. Litt.* 176. a. And therefore it must be alleged as the Custom of the Place, or it cannot be supported.

Neither can this Custom be laid in every Place; for “ in an Upland Town which is
“ neither City nor Borough, the Custom of
“ *Gavelkind* or *Borough English*, cannot be
“ alleged.” [except in *Kent* where Gavelkind is the Custom of the whole County. *Fitzb. Barre* 119.] “ But these are Customs
“ which may be in Cities or Boroughs; al-
“ so if Lands be within a Manor, Fee, or
“ Seigniori, the same by the Custom of
“ the Manor, Fee, or Seigniori, may be
“ of the Nature of Gavelkind, or Borough
“ *English.* *Co. Lit.* 110. b. In

of Gavelkind may be maintained.

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Chap III.

In a *Nuper Obiit* brought by a younger Brother against his Elder, for his Share of the Partible Lands of his Father, the Demandant counts, that all the Lands and Tenements in the Town of S. are and have been, Time out of Mind, departible among the Males, and that these Tenements are within the Town of S. But the Court inform him that his Demand is insufficient; for that if he will put the Tenements out of the common Course of Law, he ought to do it by reason of the common Custom of the Country, or of some Royalty, as by reason of a Seigniorie or Fee; as to say that the Lands and Tenements within such a Fee are departible, or are of such a Tenure, &c. Whereupon the Demandant counts that all the Lands and Tenements within the Fee of S. are and have been Time out of Mind departible, &c. *Hill. 16 Ed. 2. Fitzb. Prescription 53.*

The Custom of Gavelkind may likewise be alledged within a *Soke*. *Couldsb. 105.* which, according to that Case, is a Precinct to which divers Manors come to do Suit, and (as a great Leer) comprehending divers other Courts. According to *Fleta, lib. 1. c. 47.* *Soke significat Libertatem, Cur' Tenentium:* Or, as Mr. Somner more accurately expounds it, The Saxon Word *Soc, Soke, Socne*, signifies a Liberty, Privilege, Franchise, &c. or the Precinct or Territory wherein such Liberty, &c. is exercised, *fol. 133, 137.*

The Reason of putting this Restriction on the Custom in Point of Place, is the Inconvenience and Incertainty that might arise, if

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the

In what Places the Custom

Book. I.
 Polt. lib. 2. c.
 3. *ad fin.*

the Usage of every little Village were suffer'd to change the Law. Indeed any Town may alledge a Custom in Furtherance and Advancement of their Right in Law; as to have a Way to Church, or to make By-Laws to regulate their Common, or concerning their Highways. 21 *Ed.* 4. 54. *a.* 1 *Inst.* 110. *b.* 5 *Rep.* 63. *a.* But it is said generally 7 *Ed.* 2. *Mayn.* 212. That tho' the Usage of the Country may defeat the Common Law, the Usage of one or two Towns shall not defeat the Common Law: And in 39 *Ed.* 3. 2. *b.* That the People of a Town cannot alledge a Usage which is against common Right, if they do not alledge that the Tenements are within a certain Fee or Borough.

Several Places
 out of *Kent*
 where the
 Lands are
 partible.

Before I conclude this Chapter, I will take Notice of some among the many Places out of the County of *Kent*, wherein this Manner of Descent yet remains, or at least has been in Force within Time of Memory.

The Lands lying in *Osweldbeck-soke* in the County of *Nottingham* were partible among the Heirs Male, till in 32 *H.* 8. an Act of Parliament was obtained (*cap.* 29.) to make them inheritable according to the Common Law.

It appears by *Hill.* 20 *Ed.* 3. *B. R.* rot. 97. that the Lands within the Fee of *Pickering* in *Norfolk* were then partible among the Males.

And the same is said to be the Custom of the *Soke* of *Rotbelay* in *Leicestershire*. *Goulds.* 105.

Twisden Justice takes Notice in the Case of *Wiseman* and *Cotton* 1 *Sid.* 137. that the Custom

of Gavelkind may be maintained.

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Custom of Gavelkind is in many Towns in *Suffex*; but that scarce any two Places agree in any other of the *Kentish* Customs, but that of the Descent. The Lands lying within the Port of *Rye* in *Suffex* are partible among the Males, and the Wife is endowed of a Moie-ty, as in Gavelkind. Chap. III.

In *Monmouthshire*, the Lands in the Ma-nors of *Monmouth*, *Usk*, and *Trelleg*, all of large Extent, and in many other Manors in the same County (as I am informed) both Copyhold and Freehold, to this Day descend equally among the Males.

3 fe. 27. H. 8. c. 26. s. 2. 34. & 35. H. 8. c. 26. s. 91. 128. which expressly exclude Gavelkind descent in Wales & Mon-mouthshire.

Mr. Taylor, p. 151. affirms of his own Knowledge that there is much Gavelkind Land in *Shropshire*.

In the Territory of *Urchinfield* in *Herefordshire*, which contains two Hundreds, all the Lands are partible among the Males, and in their Default, among the Females. *Tayl. on Gavelk.* 100, 103, 107.

Philipot in his *Villare Cantianum*, p. 161. says that *Kentish Town* near *Highbate* partakes of the Customs of Gavelkind. Which may probably be the Reason of its Name.

The Copyholds of the Manors of * *Stepney* and *Hackney* in *Middlesex*, which are of large Extent, descend according to the Nature of Gavelkind, as well in the collateral as the direct Line; as is fully set forth in the Customal of those Manors (now in Print) agreed upon between the Lord and Te-

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nants

* In this Manor are the Lands at *Mile End* mentioned in 2 *Vern.* 163. *Bradley* and *Bradley*, to be descendible after the Manner of Gavelkind.

nants in the Year 1587, and afterwards confirmed by a private Act of Parliament, in 21 Jac. 1.

And see hereafter Chap. 4 and 5. other Instances of Places subject to the like Custom.

There is in some few Places a Custom of Partition still more extensive than Gavelkind. By a Record *de Itin. Dorset.* 16 Ed. 1. to be found in *Taylor on Gavelkind* 101, it appears that the Lands within the Borough of *Wareham* in *Dorsetshire* descended by the Custom to both Males and Females by an equal Partition. And I am credibly informed that the Lands in *Taunton Dean* in *Somersetshire* descend in the same Manner.

And the same was formerly the Custom of the City of *Exeter*, as appears by *Pasch.* 5 H. 4. *coram Rege* rot. 29. In an Affize of Fresh Force brought in the Court of the City of *Exeter* by *John Shepard* and *Joan* his Wife, against *Peter Courtenay* Knight, and afterwards removed into B. R. by Writ of Error, the Title of the Plaintiff *Joan* to a Moiety of the Premises in Question is *ut Consanguinea & una heredum, secundum Consuetudinem dictæ Civitatis*, of her Grandfather who died seised (tho' it appears by the Record, that she had a Brother at the Time) *et quod omnia Tenementa in eadem Civitate sunt departibilia inter masculos & fœminas*. And in the Sequel there is Judgment for the Plaintiffs. But by a private Act of Parliament 23 Eliz. c. 12, the Gavelkind Lands (as they are there improperly called) within the City of *Exeter*, are made inheritable as Lands at the Common Law. In

of Gavelkind may be maintained.

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Chap. III.

In *Itin. Rotel.* 14 *Ed.* 1. rot. 2. in dorso
Rex. In a *Nuper Obiit* brought by *Robert, Re-*
ginald, and *John le Chapeleyn* against *William*
their elder Brother, for the partible Inheri-
tance of their Father in *Skultborp & Moreste*
in that County, there is Mention of a cu-
stomary Partition of a more restrained Na-
ture than I have met with elsewhere; for
the Demandants set forth, *quod talis est*
Consuetudo tenuræ in prædictis villis, quod
tenementa, quæ tenentur in Socagium, tantum-
modo partibilia sunt inter fratres de primo
Ventre, & non inter fratres de diverso Ventre.

C H A P.

C H A P. IV.

Of the Manner of pleading the Custom of Gavelkind; and the Difference as to this between Kent and other Counties, and between the General and Special Customs.

AS the Custom of Gavelkind is but local, and not universal, he that would entitle himself by it, must in his Count or Declaration, or if he be a Defendant, in his Plea make Mention of the Custom whereon he founds his Right to the Land; as to say, that the Land is of the Custom of Gavelkind, or, as is the more usual Way of Pleading, that it is *of the Nature and Tenure of Gavelkind*. 5 Ed. 4. 8. b. Fitzb. Custom 4. 21 Ed. 4. 57. b. 22 Ed. 4. 32. b. 1 And. 192. Co. Litt. 175. b. And accordingly it was determined in the Case of *Humphry and Batbursf*, 1 Lutw. 754. That the Court could not take Notice that Lands in *Kent* were of the Nature of Gavelkind, without something pleaded, or found in the Record concerning it.

But, if the Lands be in *Kent*, it is not required that this Custom be pleaded in a special and prescriptive Manner; for the Judges of the Common Law pay a particular Respect to the Customs of Gavelkind and *Borough-English*, above all others, by taking Notice of the Nature of them when they are generally alledged, for they are as a general

Of the Banner of pleading, &c.

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Chap. IV.

neral Law. 5 Ed. 4. 8. * *b. Fitzb. Custom* 4. 21 Ed. 4. 56. *b. Co. Lit.* 175. *b. Cro. Car.* 562. 1 *Sid.* 138. 1 *Lutw.* 754. *Salk.* 243. 6 *Mod.* 121, in the Case of *Clement* and *Scudamore*: And therefore, in demanding Gavelkind Land a Man need not prescribe in certain, and shew that the Town, Borough, or City in *Kent*, where the Lands be, is an ancient Town, Borough, or City, and that the Custom has been there Time out of Mind, that Lands within the same Town, Borough, or City, should descend to all the Heirs Males; but it is sufficient to shew the Custom at large, and to say that the Lands lie in *Kent*, and are of the Nature of Gavelkind. *Lamb. Peramb.* 198.

Such therefore is the Diversity between a general Mention of the Custom, and no Mention at all: Nor is there any Book to the contrary of this but *Godb.* 55. where it is said, that in the Prescription of Gavelkind the Party ought to shew that the Land is *partible*, and has been parted.

But this is certainly not Law, unless it be confined merely to such Lands of this Nature, as lie out of the County of *Kent*; in which Places indeed the Plea ought to run, that the Land within the Fee, *Ec. a toto tempore, Ec. partibilia fuerunt Ec. partita, Ec.* as being against common Right; and the accustomable and actual Partition is necessary.

* Where the Book is misprinted, *nemi* being left out before the Word *prescribe*, as is agreed in 1 *Sid.* 138. *Raym.* 77.

cessary to be pleaded as well as proved. *Somm.* 48, 53. 3 *Keb.* 216. *Per Hale Ch. J.* And 2 *Ed.* 3. 12. concerning the Lands of the Fee of the *Marshal* in *Norfolk*, 5 *Ed.* 3. 64. concerning Lands within the Fee of *Gelfy*, 8 *Ed.* 3. 42. *b.* concerning Lands lying in *Saxham* (near *Bury*) in *Suffolk* of the Fee of *Pertingfee*, and 9 *Ed.* 3. 40. *b.* of Lands within the Fee of *Richmond* are accordingly: In all which Cases the Parties were compelled to shew between whom the Tenements had been parted; for that otherwise they could not draw them out of the Course of the Common Law, *except in Gavelkind*, where it is the Usage of the whole Country, and the Tenements are departible of Common Right. Indeed in 9 *Ed.* 3. 27. it is holden not to be necessary to aver the actual Partition; because having said that the Lands are partible, it is the same Thing, the Partibility being a Consequence of their having been actually parted. And it seems the actual Partition need not be pleaded in the very Lands in Question, tho' out of the County of *Kent*, but it may be sufficient if shewn in other Lands of the same Nature within the Fee, &c. *Vide Fitzh. Prescription* 53. *Bro. Custom* 66. *Post. chap.* 5. and 2 *Ed.* 3. 12. 3 *Ed.* 3. 38. 5 *Ed.* 3. 64. and *Robert le Chapeleyn's Case. Itin. Rotel.* 14 *Ed.* 1. *rot.* 2. *in dorso Rex.*

From the judicial Knowledge of our Custom it follows, that if Heirs in *Gavelkind* bring an Action ancestral, and declare on the Custom, it cannot be traversed that there is no such Custom as *Gavelkind*; for it is the

I

Com-

the Custom of Gavelkind.

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Common Law where it is used ; and it is of Record, and known at the Common Law, and therefore twelve Men shall not make trial of it. So *Borough English* is in divers Towns ; and therefore a Man shall not traverse that there is no such Custom as *Borough English* ; for it is a Custom by the Common Law. *Long Quinto Ed. 4. 31. a. 22 Ed. 4. 32. b.* Chap. IV.

But this general Doctrine, that the Courts of Law will take Notice of the Customs of Gavelkind, tho' not specially pleaded, must be taken with a Distinction ; for the better understanding of which, as well as for the Order of the following Parts of this Treatise, it will be necessary to divide the Customs incident to *Kentish* Gavelkind Lands into,

1. The *General*,

2. The *Special* Customs of Gavelkind.

Or according to the more prevailing Notion at this Day, into

Customs of
Gavelkind,
General and
Special.

1. Such as are *Parcel of* and comprehended under the Name of Gavelkind.

2. Such as are *collateral* to Gavelkind.

The first are such as, according to the Opinion of the Judges in the Case of *Wiseman* and *Cotton*, are absolutely requisite and essential to the Nature of these Lands, as is Par- Ante, pag. 6.
tibility among the Males ; which of itself, say they, will constitute Gavelkind, and without which it cannot exist. The *Special* or *Collateral* ; are such as are not necessary to the Essence of Gavelkind, nor, as they think, properly included under that Term, and
G without

Of the Manner of pleading

Book I.



without which it obtains in many Places; but are certain customary Privileges annexed to all Lands of this Nature within the County of *Kent*; and are principally these. 1. That the Husband shall be Tenant by the Curtesy of a Moiety, whether he has Issue or no. 2. That the Wife shall be endowed of a Moiety. 3. The Customary Wardship of the Infant, and that he shall have Power to alien his Lands as soon as he is out of that Custody. 4. The Father to the Bough, and the Son to the Plough. 5. That Gavelkind Lands in that County have been deviseable by Will Time out of Mind. 6. That the Lord may enter for the *Cesser* of his Tenant. 7. A particular Kind of Trial in a Writ of Right, &c.

Courts of Law
take Notice
only of the
General, and
not of the Spe-
cial Customs
of Gavelkind.
Post. chap. 5.

The Propriety of this Division, and the Use now intended to be made of the Distinction, *viz.* That the Courts of Law take judicial Notice only of the General, and not of the Special Qualities, may be collected from the Case of *Lauder and Brooks*, *Cro. Car.* 562. and *Wiseman and Cotton* 1 *Lev.* 79. 1 *Sid.* 137, 138. *Raym.* 76.

In both which, as also in the Case of *Browne and Brookes*, 2 *Sid.* 153. It is holden, that tho' it be sufficient for him, that would entitle himself to Lands by Descent according to the Custom of Gavelkind, to say, that the Land is in *Kent*, and of the Nature of Gavelkind, because the Common Law takes Notice what the Custom is; yet the Courts of Law cannot take Conusance of the particular Customs incident to *Kentish* Gavelkind, (as the Custom of devising, to have

the Custom of Gavelkind.

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have Dower of a Moiety, or to be Tenant by the Curtesy without Issue, &c.) unless they are specially pleaded, as from Time whereof, &c.

Chap. IV.

And *Holt, Cb. 7.* in the Case of *Clement* and *Scudamore, Salk. 243.* says the same of special Customs in *Borough English* Lands; that they must be pleaded by those that would take Advantage of them, and must be taken by the Court to be as they are set forth by the Pleading, and no otherwise.

CHAP. V.

What Lands and Tenements in Kent are of the Nature of the Gavelkind : Of the Effect of the Alteration of the Tenure, and of the disgavelling Statutes.

All Lands in Kent presumed to be Gavelkind.

AS the special Usages and Laws of particular Places tend in the Instances, wherein they prevail, to defeat the Course of the Common Law, the general Rule is that the Proof of a Custom is turned upon him that would take Advantage of it; but it is a peculiar Favour allowed by the Courts of Law to this Custom, that all Lands whatsoever lying in the County of *Kent* shall be presumed to be of the Nature of Gavelkind till the contrary be made to appear. *Gouge and Woodwin, Mich. 8 Geo. 2. 1734. B. R. at a Trial at Bar upon an Issue whether Lands Parcel of the Manor of Dartford in Kent were of the Nature of Gavelkind. 1 Sid. 138. Wiseman and Cotton. 2 Sid. 153. Browne and Brookes. 3 Keble 216. Randal and Writtle.*

And this is the Reason why the Books call Gavelkind by a higher Appellation than is given to any other Custom, the COMMON LAW OF KENT. *Gouge and Woodwin, Mich. 8 Geo. 2. Lamb. 111. 5 Ed. 4. 8. Somn. 44.*

V. Ante, p. 40. But the same Favour is not allowed to Gavelkind in any other County, but it lies upon the Party to prove a Customary Partition

What Lands in Kent are Gavelkind.

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tition in the Place. *Somn.* 53. 3 *Keb.* 216. Chap. V.

per Hale Ch. 7. For in no County of *England* Lands at this Day be partible among the Males of Common Right, saving in *Kent* only. 3 *Ed.* 3. 38. *Co. Litt.* 140. a.

The Presumption therefore being thus, it is natural to enquire how the contrary may be proved: And that will appear by shewing what Lands really are of the Nature of Gavelkind, and what not.

As to this, it is certain that all Lands in the County of *Kent*, which were *anciently* and *originally* holden in *Socage* Tenure, are of the Nature of Gavelkind. *Lamb. Peramb.* ⁵⁸⁷/₅₃₁ All ancient Socage Lands in *Kent* are Gavelkind, *Somn.* 50, 90. 9 *H.* 3. *Fitzb. Prescription* 63. *Palm.* 163. The Case of *Kerby Lee*.

And the Custom extends without any Distinction, as well to free *Socage* as base. *Somn.* 49, 55. Whether free or base.

And tho' there be in *Lambard's Peramb.* ⁵⁹⁸/₇₄₀ an Inquisition taken after the Death of *Walter Colepepper* in 1 *Ed.* 3. wherein the Jury found that the eldest Son was the Heir to his *Liberum Feodum*, and all his Sons in common to his Gavelkind Lands; which might induce a Belief that *anciently* there was a Distinction as to the Matter of Descent between free and base *Socage*, yet *Mr. Somner* maintains, that *Liberum Feodum* never signified *Free Socage*, but either *Feodum Militare*, *V.* 55. *H.* 3. or sometimes Lands granted *absque aliquo servitio inde reddendo*. *f.* 56, 57. *rot.* 61. And as it at present commonly signifies Lands at Common Law in Contradistinction to Lands in Antient Demesne, (*Co. Lit.* 94. b.) so it was *anciently* used in the same Sense in Opposition to Lands of the Custom of Gavelkind,

Book I.

as appears by numberless Instances on Record in the *Kentish Iters*. As *Itin. Kanc.* 21 *Ed.* 1. rot. 53. *Totus Comitatus quæstus quibus modis tenementa tenta in Gavelekynde mutari possunt in liberum feodum, &c.* And *Itin. Kanc.* 55 *H.* 3. rot. 13, 20, 21, 28. in dorso. 47. in dorso. 62, 76. 21 *Ed.* 1. *Itin. Kanc.* rot. 40. in dorso. *Post. lib. 2. c.* 7. And *Mich.* 9 *Ed.* 2. Rot. 240. C. B. And it is plain by the very Inquisition abovementioned, that the Gavelkind Lands therein contained are free Socage by the Nature of the Services, they being holden not by base and villein Works, but merely by Rents.

Ancient
Knight Ser-
vice Lands in
Kent not Ga-
velkind.

But all Lands, Tenements, and Fees in Kent originally holden by ancient Tenure of *Knights Service* are descendible to the eldest Son only, according to the ordinary Course of the Common Law, and are not of the Nature of Gavelkind, nor departible by Order of this Custom. *Lamb. Peramb.* ¹⁴⁷ ¹⁵⁰ ₁₅₁ ₁₅₂. *Somn.* 90. *Mich.* 3 *Joh.* rot. 13. in dorso. 9 *H.* 3. *Prescription* 63. 55 *H.* 3. *Itin. Kanc.* rot. 20. *Hill.* 10 *Ed.* 1. C. B. rot. 27. *De Beggbrok's Case.* 26 *H.* 8. 4. b. *Stat.* 31 *H.* 8. c. 3. 2 *Inst.* 595. *Palm.* 163. The Case of *Kirby Lee*, 1 *Sid.* 138. *Hale's Hist. of Com. Law.* 223. *Gouge and Woodwin*, *Mich.* 8 *Geo.* 2. B. R. The Reason whereof was that Lands and Tenements holden by *Knights Service*, which anciently belonged to the Nobility and Gentry, should not be carried by Descent into many Hands, whereby the Service for Defence of the Realm should be lost or diminished, and the Owners (the Lands being thus divided) become not able
to

of the Nature of Gavelkind.

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to maintain the Countenance of their Order and Degree. 2 *Inst.* 595. Chap. V.

As therefore the right Understanding of what is *Knight Service* cannot but be of Use towards discerning what Lands in this County are exempt from the Custom of Gavelkind, it may not be an improper Digression to observe, that a Tenure in Chivalry is created not only by an exprefs Reservation of some Military Service; but also if the King had before 12 *Car.* 2. granted Lands in Fee without reserving any Tenure; or if he had granted the Land by exprefs Words *absque aliquo inde reddendo*, they had in both Cases by Operation of Law been holden by Knight Service * *in Capite*, for that is best for the King. *Wheeler's Case* 6 *Rep.* 6. *b.* *Lowe's Case* 9 *Rep.* 123. As drawing Wardship and Marriage.

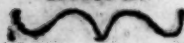
So if before 2 *Ed.* 6. 8. it had been found by Office, or since that Time, and before 12 *Car.* 2. 24. on a *Melius Inquirendum*, that *de quo vel quibus, vel per quæ servitia* the Lands were holden *Juratores ignorant*, this shall be taken to be a Tenure [by Knight Service] *in Capite*, for the best shall be taken for the King. 12 *Rep.* 135. 2 *Inst.* 692.

So if upon a *Melius Inquirendum* it were found to be a Tenure of the King, *ut de Manerio, &c. sed per quæ servitia ignorant*, this is a Tenure by Knight Service, as of a Manor. 2 *Inst.* 692.

But

* A Tenure *in Capite* is a Tenure in Gross of the Person of the King, and not of any Manor.

Book I.



Actual Parti-
tion not
necessary.

But if the King on his Grant reserve a Rose *pro omnibus servitiis*, this is a Tenure in Socage. *Wheeler's Case* 6 Rep. 6. b.

The Position already laid down, that all Lands in *Kent* of *ancient Socage* Tenure are Gavelkind, may possibly, by some, be thought too general, and that in order to subject the Lands to this Custom, it may be necessary not only that they have been holden in Socage, but likewise that the Custom of Partition has prevailed in them : But it is to be considered, that the Gavelkind Descent was the old Common Law of the Land, and is yet the Common Law of this County, and therefore not to be prescribed in, nor is it necessary that the younger Sons entitling themselves to these Lands by Descent, should alledge that they have ever been actually departed, but they shall be presumed to be of that Nature till the contrary be proved. 2 Ed. 3. 12. 3 Ed. 3. 38. 8 Ed. 3. 42. 5 Ed. 3. 64.

Ante, P. 44.

Mr. Somner pag. 49, 50. and Mr. Lambard in his *Peramb.* p. 112. are both of Opinion, that Gavelkind in this County is to be tried by the Manner of the Socage Services, and not by the Touch of some former Partition; and that tho' the Land has never been parted in Deed, yet if it remains partible in its Nature, it may be parted whenever there shall be Occasion.

Title was made in Assize, that all the Lands in the Fee of *St. Peter of York* were by Custom departible, and had been departed Time out of Mind among the Males. The Tenant pleaded, that the Lands in Demand never were departed; for that none of

Terretenants within Time of Memory had ever above one Son. But the Plea was rejected; for if the rest of the Vill is departible, this shall be departible likewise, and shall be of the same Nature: And where it is confessed that the Manor or Vill has such a Custom, it is no Plea to say, that the Land in Question has no such Custom, without shewing some special Matter, as that these Lands are of another Nature than the Gross of the Lands there, for the Custom is general. 23 *Ass. pl.* 12. *Bro. Custom*, 66.

Chap. V.
V. Plac. Ass.
10 Ric. 2.
Post. c. 5.
Steph. atte
Cherche's
Case.

In a *Nuper obiit* for a Moiety of Lands within the Fee of S. within which Fee, as the Demandant alledged, all the Lands were departible, and had been departed Time out of Mind, the Tenant would have pleaded, that the * Lands in Demand were not departible, but the Court refused to receive this Issue, and drove him to plead either that the Lands within the Fee of S. were not departible, or that the Lands in Demand were not within the Fee: Whereupon the Tenant took Issue on the Custom, that the Tenements within the Fee were not departible. *Hill.* 16 *Ed.* 2. *Fitzb. Prescription*, 53.

H

Seeing

* Yet in 2 *Ed.* 3. 12. 3 *Ed.* 3. 21. a. 9 *Ed.* 3. 14. b. & 42. b. & M. 10 H. 3. *Prescription*, 64. such Issue was received concerning Lands out of *Kent*; indeed without Debate, except in the first Case. But in 5 *Ed.* 3. 64. concerning Lands out of *Kent*, it was doubted whether the actual Partition of the very Lands in Question was traversable; and so likewise in 3 *Ed.* 3. 38. And it is laid down generally in *Co. Litt.* 78. b. that of common Intendment one Part of a Manor shall not be of another Nature than the rest.

No Prescrip-
tion against
Gavelkind
in *Kent*.

V. Ante 32.

V. Robert le
Chapeleyn's
Case, Itin.
Rotel. 14 Ed.
1. rot. 2. in
dorfo. Rex.

No Usage in
Kent against
the general
Custom of
Gavelkind.

Seeing therefore that an actual Partition of the Lands is not necessary to be proved, let us consider what will be the Effect of a contrary Usage shewn on the other Side; and first, whether any particular Person can prescribe in a contrary Course of Descent. And I take it, that a personal Prescription, that a Man and his Ancestors, &c. have Time out of Mind, inherited Socage Lands in *Kent*, by Descent to the eldest Son, can no more prevail against the Common Law of the County, than in other Shires a contrary Prescription by the younger Sons, will make the Lands descendible according to Gavelkind.

If Lands in Gavelkind descend, and the eldest Son has always entered claiming the Whole, so that they never were departed, for that the younger Brothers never put in their Claim, but they now come to claim; it shall be no Plea to say, that the eldest Son has always had the Whole, *absque hoc*, that the younger Brothers ever had anything, against the Usages which are so general, that Lands of the Nature of Gavelkind are departible. *Mich. 16 Ed. 2. Fitzb. Prescription, 52. Lamb. Peramb. 111.*

If a personal Prescription cannot overthrow the Custom, what then will be the Force of a contrary Usage in any whole Town or Village within this County (especially if it be not an Upland Town but a Borough) whose Socage Lands may have always been inherited by the eldest Son, and the Descent in Gavelkind never practised there? Mr. *Lambard* 111. holds, that a City, Town, or Borough

of the Nature of Gavelkind.

rough can no more be exempted for the only Default of putting this Custom in Ure, than the eldest Son in the Case before may prescribe against his younger Brethren: And this, he says, was in his Time the resolute and settled Opinion, not only of the best Professors and Practisers, but of the Justices and Judges of the Law.

I have confined the Description of Gavelkind Lands in this County, to Lands originally of Socage Tenure, for a Tenure of this Kind newly or lately created cannot intitule to the Benefit of the Custom, which in the Nature of it must have continued Time out of Mind: And therefore, if Lands originally holden by Military Services come into the Hands of the Crown, and are afterwards granted out again to be holden in Socage, this will not reduce them to the Nature of Gavelkind, but they will remain as before descendible to the eldest Son only. *Lamb. Peramb.* 191. *Gouge and Woodwin, Mich. 8 Geo. 2. B. R.*

And for the same Reason the Statute 12 Car. 2. 24. which reduces all Military Tenures to free and common Socage, being made within Time of Memory, cannot be said to make all the Lands in *Kent* holden originally by Knight-Service to be now divisible among the Males generally, if the Custom of Gavelkind never before attached upon them. *Gouge and Woodwin.*

Nor can Gavelkind be created, or Lands made partible at this Day, after the Manner of this Custom in Derogation of the Common Law, even by the King's express Grant.

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for that Purpose; and accordingly it is laid down, 37 *H. 6. 27. a.* and *per Coke 1 Roll's Rep. 46.* that the King cannot by his Letters Patents grant that Lands shall be of the Nature of *Borough-English*, and descendible to the youngest Son. For Customs receiving their Perfection from the Continuance of Time, come not within the Compass of the King's Prerogative. *Coke's Copyholder, Sect. 31.*

Or from Socage to Knight-Service.

Nor, on the other Hand, will every Alteration of the Socage Tenure within Time of Memory, take away or abrogate the Custom: And therefore it has been adjudged in *B. R.* that if a Man seised of Land of the Nature of Gavelkind makes a Gift in Tail to hold of him by Knight-Service, this Land shall be partible notwithstanding. 26 *H. 8. 4. b.*

And by *Mountague Ch. J.* Where Land in *Kent* was holden in Socage in Gavelkind in the Beginning, and now much of it is holden in Knight-Service, yet the Custom of Gavelkind remains; for it runs with the Land, and is by Reason of the Land. *Dalif. 12.*

Of the antient Power of the King and Archbishop of Canterbury to change the Descent of Gavelkind Lands.

Anciently indeed our Kings exercised a Prerogative of changing the Customary Descent together with the Tenure; nor was this a Power inseparably incident to the Crown, but sometimes delegated to others; for King *John* in the 3d Year of his Reign granted to *Hubert Archbishop of Canterbury*, ' & successoribus suis imperpetuum, quod liceat eis terras, quas homines de feodo Ecclesiæ Cantuariensis tenent in Gavelkind, convertere

tere in feodo militum. Et quod idem Episcopus & successores sui eandem in omnibus potestatem & libertatem habeant in perpetuum in homines illos, qui terras easdem ita in feodo militum conversas tenebunt, & in hæredes eorum, quam ipse Archiepiscopus habet & successores sui post eum habebunt in alios milites de feodo Ecclesiæ Cantuar. & in hæredes. Et homines illi & hæredes eorum eandem & omnem libertatem habeant in perpetuum, quam alii milites de feodo Ecclesiæ Cantuar' & hæredes eorum habent, &c.' See the whole Charter in Lamb. Peramb. 588. and Wilk. Saxon Laws. And such was accounted the Effect of the Alteration of the Tenure under this Licence, that the Gavelkind Lands so converted into Military Fees became from thenceforth descendible to the eldest Son only; as appears by

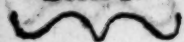
55 H. 3. Itin. Kanc. Rot. 61. in dorso.

In a *Nuper obiit* brought by *Alan de la Nuper obiit.*

Beclaunde against *Walter de la Beclaunde* his elder Brother, for a Moiety of the Lands of their Ancestor in *Maydenstan*, &c. The Tenant pleads, that the Demandant ' non de-

bet inde propartem habere, quia dicit, quòd omnia prædicta tenementa aliquo tempore tenebantur in Gavelykynde, sed dicit quòd quidam *Hubertus* filius *Walteri* quondam *Archiepiscopus Cantuariensis*, de cujus feodo prædicta tenementa fuerunt, & cui 7. Rex pater Domini R. nunc, concessit per cartam suam quòd ipse & successores sui possent omnia tenementa de ipfis intituled.

Bar, that the Lands were changed by the Archbishop (of whom they are holden) from Gavelkind into Frank-Fee, and therefore the younger Brother not



The Deman-
dant replies,
that it could
not be done
without Con-
sent of the
Chapter.

The whole
County find it
might be done
without Con-
sent of the
Chapter.

* For the
Meaning of
this Expressi-
on, see post
lib. 2. c. 7.

† But see *Au-
cher's Case*,
3 Ed. 2. infra
lib. 2. c. 8.

Judgment for
the Tenant.

‘ ipsis tenta in Gavelykynde in liberum
‘ feodum convertere, concessit cuidem *Alano*
‘ avo ipsius *Walteri* unum jugum & decem
‘ acras terræ cum pertinentiis in *Maydenstan*,
‘ viz. prædictum Messuagium & terram,
‘ &c. unde prædictus *Alanus* petit pro partem
‘ suam, tenendum sibi & hæredibus suis in
‘ liberum feodum per servitium Militare vi-
‘ cesimæ partis feodi militis, & per vi-
‘ ginti octo solidos reddendos per annum.’

‘ Et prædictus *Alanus* dicit, quod præ-
‘ dicta Carta, quam prædictus *Archiepis-*
‘ *copus* fecit prædicto *Alano* avo prædicti
‘ *Walteri* sine assensu Capituli sui, non debet
‘ ei obesse, quia dicit quod Consuetudo *Kan-*
‘ *ciæ* talis est quod nullus *Archiepiscopus* po-
‘ test aliquam terram, quæ tenetur in Ga-
‘ velykynde, in liberum feodum convertere
‘ sine assensu prædicti Capituli; & petit ju-
‘ dicium si prædicta Carta ei debeat obesse,
‘ & quod Consuetudo talis est ponit se super
‘ patriam. Ideò fiat inde Jurata. Postea
‘ * *Totus Comitatus recordatur* quod Rex *Jo-*
‘ *bannes* pater Domini R. nunc, concessit
‘ *Huberto Waltero* quondam Archiepiscopo
‘ *Cantuariensi* & successoribus suis, quod ipsi
‘ convertere possent terras de eis tentas in Ga-
‘ velykynde in liberum feodum, & quod ipse
‘ *Archiepiscopus* & successores sui semper,
‘ † irrequisito assensu & voluntate Capi-
‘ tuli Ecclesiæ Christi *Cantuariensis*, pro vo-
‘ luntate suâ quodocunq; voluerunt, hucusq;
‘ hoc facere consueverunt. Ideo consideratum
‘ est quod prædictus *Walterus* eat inde sine
‘ die quoad prædictam terram, & prædictus
‘ *Alanus*

* *Alanus nihil capiat, &c. Sed sit in mīa,* Chap. V.
* &c.

And this Power of the King and Archbishop to change the Descent is farther recorded 21 *Ed. 1. Itin. Kanc. Rot. 53.* 'Totus Comitatus quæsitus quibus modis tene-
' menta tenta in Gavelekynde mutari pos-
' sunt in liberum feodum, dicunt quod tan-
' tūm ex facto & concessione Regum *An-*
' *glie* & Archiepiscoporum *Cantuariensium,*
' &c. *Resid. post. pag. 69.*

But the Charter of King *John* to the Archbishop seems afterwards to have received a contrary Construction; for it is said by the Court in 26 *H. 8. 4. b.* that there is certain Land holden of the Archbishop of *Canterbury* by Knight-Service, which is Gavelkind departible among the Males.

As to the Power of the Crown in this Particular, there is a notable Record in *Mich. 9 Ed. 2. C. B. Rot. 240.* wherein it is admitted, that the King may change the Descent of Gavelkind Lands immediately holden of the Crown, but the Controversy is, whether this Prerogative extends to such Lands as are holden of common Persons. The whole Record is very long, but there is something curious in it, that may excuse the inserting *verbatim* all that relates to the present Purpose.

* *Kanc. Nuper obiit* by *Richard* and *Wil. Nuper obiit.*
liam Sons of *Richard de Gatewyk*, for their
reasonable

* This Suit was commenced in *Itin. Kanc. 6 Ed. 2.* and is *Rot. 80.* of that *Iter*, and was from thence adjourned into *C. B.* (as I suppose) *propter difficultatem.*

Book I.

reasonable Parts of the Inheritance of their Father in *Esse* near *Mepeham*, against *Katharine*, *Margaret* and *Elizabeth de Gatenwyk* the Daughters of *John* their elder Brother.

See this Part of
the Pleadings,
post lib. 2.
c. 3.

As to the Purparty claimed by *Richard*, the Tenants, by their Guardian, plead a Release by him of his Right when of the Age of fifteen, which is by Verdict found to be good by the Custom, and Judgment is accordingly given against him.

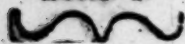
‘ Et quoad propartem prædicti *Will'i*, &c.
‘ dicunt quod idem *Will'us* nichil exigere
‘ potest de prædictis tenementis nomine
‘ propartis, &c. Dicunt enim quod tres a-
‘ cræ terræ de prædictis tenementis fuerunt
‘ perquisitum prædicti *Johannis* patris sui,
‘ tenendum sibi & hæredibus suis; absq; hoc
‘ quod prædictis *Ricardus* obiisset inde seisi-
‘ tus, &c. Et hoc paratæ sunt verificare,
‘ &c.’

Plea, that the
Tenure of the
Lands was
changed into
Knight-Ser-
vice by the
Grant of the
Lord con-
firmed by the
King, and
therefore to
descend to
the eldest Son.

‘ Et quoad residuum omnium aliorum
‘ tenementorum dicunt quod tenementa illa
‘ sunt *liberum feodum*, & tenentur per ser-
‘ vitium militare, & non de tenurâ de Ga-
‘ velykynde; Dicunt enim quod tenementa
‘ illa dudum fuerunt in feisinâ cujusdam
‘ *Will'i de Faukeham*, qui illa tenuit imme-
‘ diatè de quâdam *Mabilla de Torpel*, quæ
‘ quidem *Mabilla* per cartam suam concessit
‘ & confirmavit ipsi *Will'o* & hæredibus
‘ suis pro homagio & servitiò suo omnes
‘ terras suas quas habuit in villâ ipsius *Ma-
‘ billæ de Esse* cum omnibus pertinentiis suis,
‘ habendum & tenendum eidem *Will'o* &
‘ hæredibus suis de ipsâ *Mabillâ* & hæredibus
‘ suis imperpetuum per liberum servitium
‘ quartæ

quartæ partis feodi unius militis, & per
 viginti & septem solidos ipsi *Mabilla* &
 hæredibus suis annuatim reddendos, &c.
 pro omni servitio consuetudine & demanda,
 quæ ad ipsam *Mabillam* vel hæredes suos
 aliquo modo pertinere possent, &c. Di-
 cunt etiam quod Dominus *H. Rex* avus
 Domini *R.* nunc per cartam suam, prædic-
 tam cartam prædictæ *Mabilla* recitans, il-
 lam gratam & ratam habens, ea prædicto
Will'o de Faukeham & hæredibus suis con-
 cessit & pro ipso Rege & hæredibus suis
 sigillo suo confirmavit: Et proferunt hic
 tam prædictam cartam prædictæ *Mabilla*
 quam prædictam cartam Domini *H. R.*
 quæ prædictam concessionem testantur in
 formâ prædicta, &c. Qui quidem *Will'us*
de Faukeham tenementa prædicta extunc
 tenuit libere per homagium & servitium
 militare & liberum servitium, sicut præ-
 dictum est, & inde obiit seifitus, cui suc-
 cessit in iisdem quidam *Galfridus* ut filius
 ejus & hæres, qui illa similiter tenuit per
 servitium militare. Qui quidem *Galfri-*
dus de tenementis illis feoffavit prædictum
Richardum de Gatewyk patrem prædicto-
 rum *Richardi* filii *Richardi* & *Will'i*, &
 avum ipsarum *Katharine* & aliarum, tenen-
 dum sibi & hæredibus suis imperpetuum
 de capitalibus Dominis feodi, &c. per ser-
 vitia quæ ad illa tenementa pertinent.
 Qui quidem *Richardus* toto tempore suo
 tenementa illa tenuit per servitium mili-
 tare, & inde obiit seifitus ut de libero feo-
 do; cui successit in eisdem prædictus
Johannes de Gatewyk pater ipsarum *Katha-*
rine

Book. I.



‘ rine & aliarum, qui illa similiter tenuit
 ‘ per servitium militare, & inde obiit sei-
 ‘ situs ut de libero feodo, &c. unde pe-
 ‘ tunt iudicium, &c.

‘ Et idem *Willus*, quoad prædictas tres a-
 ‘ cras terræ, quas prædicta *Katbarina* & aliæ
 ‘ afferunt prædictum *Johannem* patrem suum
 ‘ perquisivisse, dicit quod terra illa non fuit
 ‘ perquisitum prædicti *Johannis*, immò jus
 ‘ prædicti *Richardi* patris, &c. & avi, &c.
 ‘ qui inde obiit seifitus, &c. & hoc petit
 ‘ quod inquiratur per patriam, & prædicta
 ‘ *Katbarina* & aliæ similiter.

‘ Et idem *Willus*, quoad hoc quod præ-
 ‘ dicta *Katbarina* & aliæ nituntur probare
 ‘ prædicta tenementa esse liberum feodum
 ‘ virtute prædictæ cartæ Domini Regis, di-
 ‘ cit quoad quatuor viginti acras terræ, qua-
 ‘ tuor acras bosci, & prædictum redditum,
 ‘ acetiam tertiam partem unius messuagii
 ‘ de prædictis tenementis, quòd non con-
 ‘ tinentur in eadem carta, & hoc petit
 ‘ quòd inquiratur per patriam, & *Katbarina*
 ‘ & aliæ similiter.

‘ Et idem *Willus*, quoad residuum om-
 ‘ nium prædictorum tenementorum quæ in
 ‘ prædicta carta Regis continentur, dicit
 ‘ quòd carta illa ei obfata non debet, nec
 ‘ virtute ejusdem cartæ natura prædictorum
 ‘ tenementorum, quæ ante confectioem
 ‘ prædictæ cartæ & tempore confectiois
 ‘ ejusdem fuerunt de tenurâ de Gavelykynde,
 ‘ permutari potuit seu debuit; dicit enim
 ‘ quod *secundum Consuetudinem Comitatus*
 ‘ *Kancie nullus potest de tenementis quæ sunt*
 ‘ *de tenurâ de Gavelykynde facere liberum*
 ‘ *feodum*

Reply, That
 no one can
 change Ga-
 velkind into
 Frank-Fee
 but the King
 and Archbi-
 shop of Can-
 terbury, and
 that only for
 such Lands as
 are holden
 immediately
 of them.

feodum, nisi tantum Dominus Rex & Archiepiscopus Cantuariensis, & hoc solummodo de tenementis quæ de ipsis Rege & Archiepiscopo tenentur in Capite immediate: Et dicit quod prædicta Mabilla de Torpel, de quâ prædictus Willus de Faukeham tenementa illa tenuit, illa tenuit ulterius de quodam Rogero de Monulye, & idem Rogerus illa tenuit de Huberto de Burgh tunc Comite Kancie, & idem Comes illa tenuit de prædicto Henrico Rege, &c. & dicit quod ipse paratus est verificare secundum Consuetudinem prædictam.

Et Katharina & aliæ dicunt quod Consuetudo non est talis in partibus illis, qualem prædictus Willus illam esse asserit; dicunt enim quod Dominus Rex per cartam suam potest facere liberum feodum de tenementis quæ sunt de Tenurâ de Gavelkynde tam de illis quæ tenentur de ipso Rege immediate, * quam de illis quæ tenentur de ipso immediate: & hoc paratæ sunt verificare, &c. Et super hoc dies datus eis de audiendo iudicio suo hîc, &c. a die Pasce in xv dies, utrum verificatio illa contra tenorem cartæ prædictæ admittenda sit. Et quoad omnes alios articulos prædictos unde partes prædictæ posuerunt se in Iudicio ratam

Chap. V.

Rejoinder, that the King may change Gavelkind into Frank-Fee, tho' the Lands are not holden immediately of him.

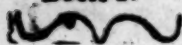
Continuances.

I 2

ratam

* Henricus Pratt dat Regi 2 Palfredos pro habenda confirmatione Dom. Regis de 4 Jugatis & 5 Acris terræ in Villa de Bradborne in Gavelkynd, ad tenendum de cætero in dimidio feodi militis, sicut Charta Baldwini de Betun Comitis Albemarle testatur: Fin. Reg. Johannis, Memb. 8. Lamb. Peramb. 1133.

Book I.



Verdict as to Part.

As to the Lands contained in the King's Charter, Day given over.

' ratam patriæ, præceptum est Vicecomiti
 ' quod venire faciat, &c. Postea, &c. Juratores
 ' de consensu partium electi venerunt & di-
 ' cunt super sacramentum suum, &c. quod
 ' *Richardus* de *Gatewayk* pater prædicti *Will'i*
 ' non obiit seifitus de prædictis tribus acris
 ' terræ pro partem ipsius *Will'i* contingen-
 ' tibus. Dicunt etiam quod prædictæ
 ' 24 acræ terræ, 4 acræ bosci, 30 soli-
 ' dati redditus, & tertia pars unius messuagii
 ' continentur in prædicta carta Domini Re-
 ' gis, exceptis xv acris terræ de iisdem quæ
 ' non continentur in eadem cartâ eò quod
 ' post confectionem prædictæ cartæ illæ
 ' quindecim acræ terræ perquisitæ fuerunt.
 ' Ideo Consideratum est, &c. quod præ-
 ' dictus *Will'us*, quoad quinq; acras terræ pro-
 ' partem suam contingentes de prædictis xv
 ' acris terræ quæ non continentur in prædic-
 ' ta cartâ, recuperet seifinam suam & damna
 ' sua, &c. Et idem *Will'us* quoad residuum,
 ' &c. in mîa, &c.

Et quoad prædicta Tenementa in præ-
 dictâ cartâ Domini Regis contenta, Dies
 datus est de audiendo iudicio suo in Octa-
 bis Sanctæ Trin. &c. Postea venerunt
 tam prædicti *Richardus* & *Will'us* quam
 prædicta *Katharina* & aliæ, &c.

' Et prædicta *Katharina* & aliæ, ad ma-
 ' jorem & pleniorẽ evidentiam & decla-
 ' rationem rationis suæ præallegatæ, viz.
 ' quòd Dominus Rex potest facere liberum
 ' feodum de tenementis, quæ sunt de tenu-
 ' râ de *Gavelykynde*, de aliis quàm de illis
 ' quæ tenentur de ipso Rege immediatè,
 ' pro-

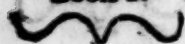
of the Nature of Gavelkind.

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proferunt hic breve Domini Regis in hæc verba. Chap. V.

Edwardus Dei gratiâ &c. Justiciariis The King
 suis de Banco salutem. Cum Richardus de writes to the
 Gatewyk & Willus de Gatewyk implacitent Judges to in-
 coram vobis in eodem Banco Katherinam form them of
 de Gatewyk, Marg. & Eliz. sorores ejusdem his Preroga-
 Katherinæ, de duabus partibus unius Messua- tive to change
 gii, &c. (reciting the Premisses in Question) the Tenure
 in Essbe juxta Mepeham, in quo quidem and Descent of
 placito idem Richardus & Willus placitan- Gavelkind
 do clamant prædictas duas partes, &c. esse Lands.
 jus & rationabilem partem suam, quæ eos
 contingit de Hæreditate, quæ fuit Ri-
 chardi de Gatewyk patris ipsorum Richardi
 & Will'i, & avi earundem Kath. Marg. &
 Eliz. cujus hæredes ipsi sunt, pro eo quòd
 illa tenementa sunt de tenura de Gavely-
 kynde partibilia inter omnes hæredes &
 participes hujusmodi hæreditatum in Com.
 Kanc. ac prædictæ Kath. Margareta &
 Eliz. in eodem placito coram vobis re-
 spondendo allegaverunt quòd nos hujus-
 modi tenementa in feodum militare & serjan-
 tiam mutare possimus ex Regia Potestate, &
 quod antecessores nostri sic fecerunt pro eorum
 libito voluntatis, & cartam Domini H.
 quondam Regis Angliæ avi nostri coram
 vobis exhibuerunt, per quam asserunt
 dictum avum nostrum tenementa præ-
 dicta in feodum militare mutasse & con-
 firmasse; & quia celebris memoriæ Do-
 minus E. quondam Rex Angliæ pater no-
 ster, quarto die Maii anno regni sui quarto
 Johanni de Cobeham omnes terras & tene-
 menta sua, quæ in Gavelikynd tenebantur

Book I.



in Com. *Kanc.* in servitium militare muta-
 vit, sicut per inspectionem Rotulorum
 Cancellariæ ipsius Patris nostri nobis con-
 stat, *Nos considerantes quòd transmutatio*
illa ex causis evidentibus & pro commodo
regni nostri necessario facta fuit, transcrip-
 tum cartæ illius juxta inspectionem rotu-
 lorum prædictorum vobis mitomus præ-
 sentibus interclusum, ut illo inspecto in
 dicto negotio inter præfatum *Richardum*
& Will'm, & Kath. Marg. & Eliz. pro
 nostro & regni nostri honore & commodo,
 salvâ semper justitiâ inoffensâ, consultius
 procedere valeates. T. meipso apud *Westm.*
 xii die Junii anno R. nostri decimo.

Charter of *Ed.*

1. changing
 the Descent of
 the Gavelkind
 Lands of *John*
de Cobeham.

Prædictum etiam transcriptum hic mis-
 sum inferius irrotulatur in hæc verba.
Edwardus Dei gratiâ Rex Angliæ, Do-
minus Hiberniæ & Dux Aquitaniæ, Archi-
 episcopis, Episcopis, Abbatibus, Priori-
 bus, Comitibus, Baronibus, Justiciariis,
 Vicecomitibus, Præpositis, Ministris &
 omnibus Ballivis & fidelibus suis salutem.
 Ad Regiæ Celsitudinis potestatem perti-
 net & officium, ut partium suarum leges &
 consuetudines, quas justas & utiles censet,
 ratas habeat, & observari faciat inconcus-
 sas; illas autem, quæ regni robur quan-
 doque diminuere potius, quam auge-
 re aut conservare videntur, abolere con-
 venit, aut saltem in melius apud fideles
 suos & benè meritos de speciali gratiâ
 commutare: Cúmque ex diutinâ consue-
 tudine, quæ in Comitatu *Kancie* quoad di-
 visionem & partitionem terrarum & tene-
 mentorum, quæ in Gavelikendam tenere
 solent

of the Nature of Gabelkind.

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solent, frequenter acciderit, ut terræ & tenementa, quæ in quorundam manibus integra ad magnum regni subsidium, & ad victum multorum decenter sufficere solent, in tot partes & particulas inter cohæredes postmodum distracta sunt & divisa, ut eorum nulli pars sua saltem sufficere possit ad victum: Nos obsequium laudabile dilecti & fidelis nostri *Johannis de Cobebam*, quod nobis gratanter exhibuit, gratiâ speciali & honore prosequi volentes, concedimus eidem & præcipimus pro nobis & hæredibus nostris ut omnes terræ & tenementa sua, quæ ad Gavelykendam in feodo tenet & habet in Comitatu prædicto, ad primogenitum suum vel alium hæredem suum propinquiorem post ipsum, sicut & illa quæ per Serjantiam tenet vel per servitium militare, integre & absque partitione inter alios inde faciendâ descendant, & eidem & ejus hæredibus sub eadem lege, salvis in omnibus capitalibus Dominis suis servitiis & consuetudinibus, aliisque rebus omnibus, quæ ad eos de dictis tenementis pertinere solent, imperpetuum remaneant; præsertim cum in nullius præjudicium cedere videatur, si circa terras & possessiones, quas aliis extraneis licenter concedere posset, ad ejus instantiam & consensum successionis suæ modum commutemus. Quare volumus & firmiter præcipimus pro nobis & hæredibus nostris, quòd omnes terræ & tenementa, quæ prædictus *Johannes* in Gavelykendam in feodo tenet & habet in Comitatu prædicto, ad primogenitum suum vel alium hæredem suum

' suum propinquiorum post ipsum, sicut &
 ' illa quæ per Serjantiam tenet vel per ser-
 ' vitium militare, integrè absque partitione
 ' inter alios inde faciendâ descendant, & ei-
 ' dem & ejus hæredibus sub eâdem lege,
 ' salvis in omnibus capitalibus Dominis suis
 ' servitiis & consuetudinibus, aliisque rebus
 ' omnibus, quæ ad eos de dictis tenementis
 ' pertinere solent, imperpetuum remaneant,
 ' sicut prædictum est. His Testibus, Ve-
 ' nerabilibus Patribus *R. Cantuariensi* Ar-
 ' chiepiscopo totius *Angliæ* Primate, *W. Ros-*
 ' *fensi*, & *R. Bathon & Well.* Episcopis,
 ' *Waltero de Valenciâ* avunculo nostro, *Ro-*
 ' *gero de mortuo mari*, *Pagano de Cadurtes*,
 ' *Rogero de Clifford*, *Roberto de Tybococ*,
 ' *Hugone filio Otonis*, *Waltero de Helynn*,
 ' *Stephano de Penecester*, *Rogero de Norwode*,
 ' & aliis. Datum per manum nostrum apud
 ' *Westm.* quarto die Maii anno regni nostri
 ' quarto.

' Unde eadem *Katharina* & aliæ dicunt
 ' quòd ex tenore cartæ prædictæ prædicto
 ' *Johanni de Cobeham* factæ satis liquet,
 ' quòd Dominus Rex per cartam suam po-
 ' test facere liberum feodum de tenementis
 ' quæ tenentur in Gavelikendam de aliis,
 ' quàm de illis quæ de ipso Rege tenentur
 ' immediatè; quæ quidem Carta Regis re-
 ' cordum in se gerit, per quod nulla verifi-
 ' catio patriæ in contrarium virtutis & ef-
 ' fectûs ejusdem est admittenda in hac
 ' parte, & petunt Judicium super præmissis
 ' &c. Et super hoc dies datus est eis de
 ' audiendo iudicio suo hîc, &c.' Afterwards

Continuances.

Continuances are entered for two Years more,
 but

of the Nature of Gavelkind.

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but nothing further appears on the Roll. However it is plain by the Time taken to consider of this Matter, that the Information given to the Court by the King's Writ did not satisfy their Doubt.

And the more modern Resolutions do not acknowledge any Prerogative subsisting in the Crown to change the Law and Manner of Gavelkind Descents by altering the Tenure, even as to such Lands as are immediately holden of the King.

Mr. *Lambard* says, that if Lands of ancient Socage-Service come to the Crown, and be delivered out again to be holden either of the Prince *in Capite*, or by Knight-Service of any Manor, they ought to descend according to the Custom, notwithstanding the Tenure be altered. *Peramb.* 121.
137.

And this Position is warranted by the Opinion of the Judges in *Dalif.* 23. Where it " is agreed, by themall, that tho' the Custom
" of *Burgage* Land is in Socage, yet, if af-
" terwards the Lands come to a Tenure
" in Chief, or by Knight-Service, this
" changes not the Custom; which always
" runs with the Land, and not with the
" Tenure. As Lands in Gavelkind are of Ante 52.
" Socage Tenure, yet if they are changed
" to Knight-Service the Custom is not al-
" tered, but all the Heirs shall inherit."

And the same is the Opinion of *Hale* 3 Keb. 216.
Ch. J. in his *Hist. of the Com. Law* 223. by the same
Judge.

Even in *Kent* if Gavelkind Lands escheat, or come to the Crown by Attainder, or Dissolution of Monasteries, and be granted to be holden by Knight-Service, or *per Baroniam*,

K

the

Book I.

the Customary Descent is not changed, neither can it be but by Act of Parliament, for it is a Custom fixed to the Land.

And accordingly we see, that those, who of late have been inclined to disgavel their Lands, have applied to the Legislature for that Purpose.

Of Gavelkind
Lands in the
Hands of the
Crown.

But tho' the Change of the Tenure be not a total Extinguishment of the Custom, yet it is still another Question, whether if Lands of this Nature fall into the Hands of the King, who is the Sovereign Lord of all Lands, and who can himself hold by no Tenure, or into the Hands of the Lord who holds over by Knight-Service, this may not cause a temporary Suspension of the Custom during the Continuance of such Unity of Possession.

And first let us see how Gavelkind Lands descend while in the Hands of the Crown.

As to this, Mr. *Lambard* in his *Peramb.* ¹⁹¹₁₃₈ makes a Distinction, " That if Lands
" of the Nature of Gavelkind come into the
" King's Hands by Purchase, or by Escheat
" as holden of the Manor of *A.* which he
" purchased, after his Death all his Sons
" shall inherit and divide them. But if they
" come to him by Forfeiture for Treason,
" or by Gift in Parliament, so that he is
" seised of them *in Jure Coronæ*, then his
" eldest Son only, which shall be King after
" him, shall enjoy them".

The first Part of this Distinction is denied to be Law by *Judge Twissden*, 1 *Sid.* 138. *Raym.* 77. And is founded merely on what is said by *Serjeant Southcot* in the Case of *Willion*

of the Nature of Gavelkind.

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Willien and Lord Berkeley, Plow. 234. b. That the King's Purchase vests not in his Body Politick, but in his Body Natural; and therefore if Lands in Gavelkind are given to the King and his Heirs, and he dies having two Sons, they shall both inherit together.

But there is no Foundation in Law for this Opinion; for whatever Way the King attain the Possession of Lands, as if he purchase Lands to him and his Heirs, he is seised *in Jure Coronæ*, and if he purchase Lands of the Custom of Gavelkind, and dies having divers Sons, the eldest only shall inherit these Lands. *Co. Litt. 15. b.*

Nor is it at all strange that the personal Dignity of the King should supersede this Custom, since it will cause the same Change of the Descent in Lands at Common Law; for the eldest Daughter or Sister of a King shall inherit all his Fee-simple Lands; as was the Case of *Queen Mary. Co. Litt. 15. b.*

And the *dictum* of *Southcot* is in the very Case denied to be Law by *Anthony Browne, Justice*, who holds, that if the King has two Sons and dies, each shall not have a Moiety of his Gavelkind Lands, but the eldest Son shall have the Whole by Prerogative. Indeed the same Judge admitts that if Gavelkind Land descends to the King and his Brother [which must be understood of a Descent from a Subject] each of them shall take a Moiety; for if the King should take the whole he should do a Wrong to the other, which his Prerogative will not extend to, *Plow. 247. Willien and Lord Berkeley.*

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Which agrees with the Opinion of *Moile* *Just.* 35 *H.* 6. 28. *a.* That if Lands in Gavelkind descend to the King and his Brother, the King shall be in the same Condition as another Person, and he and his Brother shall inherit jointly. Wherein is to be noted the Diversity between a Descent from a Subject to the King, and a Descent together with the Crown.

But the Possession of the Crown of Lands originally Gavelkind, and a contrary Course of Descent by Reason thereof, destroys not but only suspends the Custom, and upon a Separation by Grant of the Lands to a Subject, it immediately revives, and the Lands are again partible among the Males. *Gouge* and *Woodwin*, *Mich.* 8 *Geo.* 2. *B. R.* 2 *Sid.* 83, 1 *Sid.* 138. by *Twisden Just.* in the Case of *Wiseman* and *Cotton*; And by the Opinion of *Sir Anth. Browne Just. Lamb. Peramb.* 1191. And the Authorities before, *pag.* 65.

How Gavelkind Lands will descend in the Hands of the Lord.

In the next Place it is to be considered how Gavelkind Lands escheating or granted by the Tenant to the Lord holding over by Knight-Service will descend while in his Hands.

The Customal of *Kent* mentions that if any Tenement by Death or *Cessavit* escheat to the Lord who holds over by Knight-Service, or be by the Tenant granted to him, it shall not be partible among the Heirs Males of the Lord. And this is followed by *Mr. Somner* 144, 149. Indeed *Mr. Lamb. f.* 1194. very properly doubts concerning it as not knowing whether it be verified by Experience.

Yet

Yet it seems certain that the Custom was
 anciently thus understood; for in 21 *Ed. 1. Itin.*
Kanc. rot. 53. Berewicke Roll, upon an Is-
 sue whether Lands were Gavelkind or not, it
 is recorded that * *Totus Comitatus quæsitus* * For the
 ' quibus modis tenementa tenta in Gavele- Meaning of
 ' kynde mutari possunt in liberum feodum, this Expres-
 ' dicunt quod tantum ex facto & concessione sion see post
 ' Regum Angliæ & Archiepiscoporum Can- lib. 2. c. 7.
 ' tuariensium, & similiter quando ut eschea-
 ' ta revertuntur ad Dominos feodorum, quo-
 ' rum tenementa, ad quæ dominia hujusmo-
 ' di tenementorum tentorum in Gavele-
 ' kynde pertinent, sunt liberum feodum;
 ' & similiter quando redduntur in manus
 ' hujusmodi Dominorum præ nimio onere
 ' servitiorum sine spe ipsa rehabendi; sed
 ' dicunt quod si forte prædicti Domini hu-
 ' jusmodi tenementorum retrodederint eis,
 ' qui illa prius reddiderunt, quoquo modo,
 ' tenementa illa revertuntur ad pristinam
 ' Consuetudinem, & fiunt Gavelekynde,
 ' prout ante redditionem extiterunt, sed be-
 ' ne licet Dominis tenentes suos exonerare de
 ' servitiis inde debitis, & nihilominus tene-
 ' menta prædicta remanent partibilia per
 ' Consuetudinem de Gavelekynde." And
 Judgment was given accordingly. And the
 same Record may be found in *Hill. 26 Ed.*
1. Rot. 21. B. R. whither it was removed in
 order to Execution.

It is likewise mentioned in *Gouldsb. 106.*
 to be said in an ancient Book of 4 *Ed. 2.*
In a Nuper obiit; that if Lands which have
 been departible and departed come into the
 Lord's Hands by Escheat, they shall not be

Book I.

departible in his Hands, vel in manibus alicujus alius Perquisitoris non possunt partiri; and it is there said that such likewise was the Opinion of Bromley, Lord Chancellor.

But the Strength of the later Authorities is to the contrary.

It is said by the Court 14 H. 4. 9. b. That if Gavelkind Lands come into the Hands of the Lord the Custom is not extinct, as if the Lord of the Lands in Gavelkind purchase, &c. his Heirs Males shall inherit by the Custom. And Brooke in his Abridgment of this Case, Title Custom 19. and Extinguishment 14. says, that Unity of Possession is not an Extinguishment of the Custom of Gavelkind, Borough-English, or to be endowed of the whole, & *hujusmodi* which run with the Land.

11 H. 7. 25. b. It is said by Wood, that if the Lord purchases Land holden in Gavelkind, both Sons of the Lord shall inherit, as well as if it had remained in Possession of the Tenant; for that Gavelkind arises (*est surdant*) on the Land only.

Unity of Possession in the Lord will not hurt the Customs of Gavelkind or Borough-English, because of the Generality of them, they extending themselves throughout the whole Country. Keiw. 80.

It is holden by Brown and Hale Justices, Dalif. 12. That if Lands in Antient Demesne are partible among the Heirs Males, and the Lord purchases these Lands, his Heirs Males shall inherit together, and yet in his Hands the Land is Frank-Fee.

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of the Nature of Gavelkind.

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Chap. V.

In the Case of *Wiseman* and *Cotton*, 1 Sid. 138. One of the Councel asserts that if Gavelkind Lands are holden of a Seignior which holds in Knight-Service, and afterwards they escheat, the Gavelkind Custom is destroyed; and of this Opinion is *Windbam*, Just. in the same Case, 1 Keb. 505. which is denied by *Twisden*, Just. 1 Sid. 138. who, as is there said, was well versed in the Laws of his own Country.

In this last Case it is not expressly denied by *Twisden* that the Custom is suspended, but only that it is destroyed: Indeed the rest of the later Authorities are very strong; otherwise there might be some Colour to say that these Lands, being become by the Unity of Possession Parcel of the Manor so holden by Knight-Service, should partake of the general Nature of the Whole, and pass with the rest to the eldest Son, rather than that the Manor should be dismembered by a different Descent of the Demesnes; according to the Rule, *transcunt cum universitate, quæ per se non transcunt*.

It may not be improper to consider in the next Place by what other Means the Custom of Gavelkind may be altered, and the Lands made of the Nature of those descendible according to the Course of the Common Law.

1. The Custom of Gavelkind is not changed though a Fine or Recovery be had of the same at Common Law; for it is a Custom by Reason of the Land, and therefore runs always with the Land. *Finch's Law* 15. Dav. 36. Fine or Recovery very changes not the Nature of Gavelkind Lands.

But

Book. I.
Whether Ancient Demesne Lands partible remain so, when Frank-Fee.

But otherwise, says the same Book, it is of Lands in *Ancient Demesne* partible among the Males, for there the Custom runs not with the Lands simply, but by Reason of the Ancient Demesne; and therefore, because the Nature of the Land is changed by Fine or Recovery from Ancient Demesne to * Land at Common Law, the Custom of parting it among the Males is gone.

But it seems this Author is mistaken in the latter Part: For in *Dyer* p. 72. cited in the Margin of that Book, it is said to be the better Opinion, That if the Lands in Ancient Demesne, which are departible among the Heirs Males, are aliened by a Fine at Common Law, the Course of the Inheritance shall not be changed, nor the Lands made descendible to the Heir at Common Law.

And the Case is more fully reported in *Dalif.* 12. Where *Hale* and *Brown* Justices, hold, that if there be a Custom within Ancient Demesne that the Lands there shall be parted among the Heirs Males, tho' the Tenant levies a Fine of his Land, or suffers a Recovery at Common Law, yet the Lands are departible as before; for this Custom runs with the Land, and is not in respect of the Seigniorship which is Ancient Demesne; for if the Lord purchases these Lands, his Heirs Males shall inherit

* It is rendered Frank-Fee till the Fine or Recovery is reversed by the Lord in a Writ of Disceit. 3 Ed. 4. 6, Bro. Fine, 36, 47, 101.

herit together, and yet the Land in his Hands is Frank-Fee. But *Mountague, Ch.*

J. è contra; for this is not like the Custom of Gavelkind, which is annexed to the Land, and is by reason of the Land; but in Antient Demesne the Custom is annexed to (*trenche ove*) the Land by Reason of Antient Demesne, and therefore when the Lands become Frank-Fee they shall not be départible, for the Nature of Antient Demesne being changed, the Custom is also changed.

The Opinion of *Hale* and *Brown* in the foregoing Case is agreeable to what is laid down 49 *Ed. 3. 8. a.* by *Kirton* (a Name abridged, as I take it, for *Kyrketon* a Judge of *C. B.* at that Time) concerning Lands in Antient Demesne descendible by the Custom of the Manor to the youngest Son; in which Case, says he, if the Lord of the Manor releases to the Tenant all his Right, so that he has lost his Seigniory, or if he confirms to hold of him by lesser Services, the Nature of the Tenancy is not changed having Regard to the Inheritance of the Tenancy against the Heir, for the youngest Son shall have the Land as he would have had before, and not the Elder; nevertheless as against the Lord who released, having regard to his Seigniory, the Tenancy is changed.

But in Questions of this Kind the Custom of the Place is greatly to be regarded, for the general Intendment of Law may be controuled by a Usage to the contrary.

L

2. If

Book I.

Custom of Gavelkind in Copyhold not destroyed by Severance from the Manor.

2. If Copyhold Lands by the Custom of the Manor be of the Nature of *Borough-English* or *Gavelkind*, and the Lord severs a Copyhold from the Manor by granting the Inheritance thereof to a Stranger in Fee, or by making a Lease for Years of such Copyhold by Indenture, yet the Customs of *Gavelkind* or *Borough-English* and all other Customs which run with the Land remain notwithstanding the Severance. 4 Rep. 25. a. in *Murrel and Smith's Case*. 2 Leon. 208. *Beale and Langley*.

No Act of the Tenant can alter the Manner of Descent of *Gavelkind* Lands.

3. Lastly, the Owner of Lands cannot by his Grant change the Course of the Descent: For if a Man seised of Lands in *Gavelkind* give or devise them to his *eldest* Heirs, he cannot thereby alter the customary Inheritance but the Law, *ut res magis valeat*, rejects the Adjective *Eldest*. Co. Litt. 27.

Nor of *Borough-English*.

And the same Law is of *Borough-English*: For a Person after 27 H. 8. made a Feoffment of *Borough-English* Lands to the Use of himself and the Heirs Males of his Body *secundum Cursum Communis Legis*, and afterwards died seised; and it was the Opinion of the whole Board at *Serjeants-Inn*, that the youngest Son should have them by Descent notwithstanding the Words before-mentioned. Dyer 179. b.

Nothing can extinguish the Custom of *Gavelkind* but an Act of Parliament.

Upon the whole it may be concluded that the Nature of *Gavelkind* Land cannot be entirely changed, nor the Custom extinguished beyond a Possibility of Revivor, neither by Alteration of the Tenure, nor by Unity of Possession of the Lord, or of the King, nor by Fine or Recovery, or other Act

of the Nature of Gavelkind.

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Act of the Party, nor indeed by any ordinary Means, but by Act of Parliament only.

Chap. V.

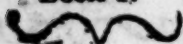
Which naturally leads me to consider the Statutes made for Disgavelling Lands in Kent, and the Effects of them.

The several Statutes made for this Purpose are 31 H. 8. 3. and six private Acts not printed in the Statute Books, one in 11 H. 7. for disgavelling the Lands of Sir Richard Guldeford; another 15 H. 8. for the Lands of Sir Hen. Wyat only; another 2 & 3 Ed. 6. for another 1 Eliz. and another in the 8th Year of the same Reign, and the last in 21 Jac. 1.

The disgavelling Statutes, and Effects of them.

The Words made Use of by the Statute 31 H. 8. 3. are, That all Manors, Lands, Tenements, Woods, Pastures, Rents, Services, Reversions and Remainders, Advowsons, and all other Hereditaments whatsoever lying and being within the County of Kent, of which the Persons mentioned in the Act were at that Time seised, which then were of the Tenure and Nature of Gavelkind, and before that Time had been departed or departible between the Heirs Males by the Custom of Gavelkind, should from thenceforth be clearly changed from the said Custom, Tenure, and Nature of Gavelkind, and should from that Time in no wise be departed or departible by the said Custom of Gavelkind between the Heirs Males, but should remain, revert, abide, descend, come or be after and according as Lands, Tenements, &c. do or may descend, remain, &c. according to the Common Law of this Rea'm, and as other Manors, Lands

*See 2. & 3. 2. 6. c. 1. of private acts
1. Eliz. c. 7. of d. o.
2. Eliz. c. 10. of d. o.
21. Jac. 1. c. 36. of d. o.
for the names of the persons, whose lands have been disgavelled, see post. 299.*



and Tenements being in the said County of *Kent* which never were held by Service of Socage, but then were and always had been holden by Knight-Service, do descend, &c. and in like Manner to descend and be descendible, remain, revert, come and be inheritable to the Heir or Heirs after and according to the said Common Laws, &c. And that all and singular the said Lands, Tenements, Hereditaments, &c. should from thenceforth be accepted, taken, inherited, deemed and judged to be like as Lands, Tenements, &c. at the Common Law, &c. and in such Manner and Form as if the same Lands, Tenements, &c. had never been of the said Nature of Gavelkind; any Usage or Custom in the said County to the contrary notwithstanding.

3 Sid. 135.

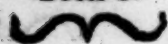
And in the Statute of *Ed. 6.* There is a Clause, That the Lands should be disgavelled, and should from thenceforth be to all Intents, Constructions and Purposes whatsoever as Lands at Common Law, as if they had never been of the Nature of Gavelkind, and that they should descend as Lands at Common Law, any Custom to the contrary notwithstanding.

The Words of these Statutes are very general to make the Lands as if they had never been of the Nature of Gavelkind, but the Construction is more restrained:

In an Ejectment for Lands in *Kent* a Question arose, whether Lands which had been Gavelkind, but were by 2 & 3 *Ed. 6.* disgavelled and made descendible according to the Course of the Common Law, did
not-

notwithstanding remain deviseable by Will according to the Custom of *Kent* as to Gavelkind: And the Court after two Arguments adjudged that the Statutes of disgaveling only took away the Partibility, and not the other Qualities or Customs appertaining to Lands in *Kent* of the Nature of Gavelkind; for that they are merely collateral to the Nature of Gavelkind (though *Wyndham* Just. thought them Parts of the Custom of Gavelkind): And the last Clause, that the Lands shall descend according to the Common Law, shall qualify the Generality of the precedent Words: And tho' such Custom were to be taken to be Parcel of and comprehended under Gavelkind, yet it was not the Design of either of these Acts to divest these Lands of any of their former Privileges not expressly altered by the Letter of these Laws; for else instead of a Benefit which the Acts intended (they being made on the Petition of the Persons therein-mentioned) the Owners of Gavelkind Lands would suffer a great Prejudice by the Loss of their former Privileges, as in the Case of Forfeiture for Felony and the like. *Hill. 13 Car. 2. B. R. rot. 476. Wiseman and Cotton. Hard. 325. 1 Sid. 135. Raym. 59, 76. 1 Lev. 79.* And the same Opinion had been before declared *obiter* by *Glynne Ch. J.* concerning the Statute 31 *H. 8. 3.* that it extends to no other Custom of the Land, save that of the Descent. In the Case of *Brown and Brookes 1659*, according to a MS. Note which I have seen of that Case written in the Hand of *Pemberton*, afterwards *Ch. J.*

It



It may be a proper Caution to the Reader, that all these disgavelling Statutes being particular Acts, the Courts of Law cannot take judicial Notice of them; but if any Use is proposed to be made of them, an attested Copy examined with the Record ought to be given in Evidence. Indeed the Statute 31 H. 8. c. 3. being printed in the Statute Book by the King's Printer, according to V. Salk. 566. the modern Practice Credit will be given to it, and it may be read in Evidence to a Jury as a true Copy.

This may suffice to shew what Lands in general are of the Nature of Gavelkind.

Remainder of
Gavelkind
Land.

It is further to be observed, that a Remainder, being but the Residue of the Estate in the Land, shall descend in the same Manner as the Lands in Possession. As if the Ancestor die seised of the Reversion or Remainder in Fee or Fee-Tail expectant on an Estate for Life or in Tail, this shall be divided among all the Heirs Males; and such Remainder of *Borough English* Lands shall descend to the youngest Son. 26 H. 8. 4. b. Bro. Custom 1. Lamb. Peram. 548. Dyer 128. Style 410.

Use.

The Use also of Gavelkind Land shall follow the Nature of the Land out of which it issues, and be partible among all the Males, it not being a Thing newly created but the ancient Use. And in *Borough English* the Use shall descend to the youngest Son; for even before the Statute 27 H. 8. the Chancellor in Case of a Use of Gavelkind or *Borough English* judged by Imitation of the Rules of the Common Law, and the Nature and

and Quality of the Land. 14 H. 8. 6. a. Chap. V.
 26 H. 8. 4. b. 2 Roll's Abr. 780. 27 H.
 8. 9. 21 Ed. 4. 24. b. 5 Ed. 4. 7. b. Bro.
Feoffment al' Uses, 32. 1 Rep. 88. 101. a.
Co. Litt. 23. a. And the same it is at pre-
 sent of a Trust.

If a Fair or Market be holden on Gavel- Profits of
 kind Land, such Profits thereof as arise a Fair or
 from or by reason of the Soil shall descend in Market.
 the same Manner as the Land would
 descend by the Custom; but such as are
 independent of the Soil shall go to the eldest
 Son only; as may be inferred from
 what is laid down by the Court, *Moor*
 474. in the Case of *Heddey* and *Well-*
bouse, That if the King grants a Fair or
 Market with Toll certain to a Man and his
 Heirs, to be holden within Land which is
Borough English, and the Grantee dies, the
 Heir at Common Law shall have the Fair or
 Market with the Toll, but the younger Son
 shall have the Pickage and Stallage as inci-
 dent to the Soil. And the same Thing was
 affirmed *obiter* by *Bury Ch. Baron*, in the
 Case of *Rebow* and *Bickerton*, *Trin.* 7 *Geo.*
 1. in *Scacc.* because the former is not annexed
 to the Land, but the latter are incident to
 the Soil.

There is no Point concerning the Law What Rents
 of Gavelkind that has given Occasion to a out of Gavel-
 greater Variety of Opinions than this, Whe- kind follow
 ther a Rent issuing out of Gavelkind Land the Nature of
 shall follow the Nature of the Land or no. the Land.

Indeed the Books generally agree, that a
 Rent which has continued Time out of
 Mind is of the Nature of the Land, and as
 such

Book I.

such shall be departible among the Heirs Males, and the Wife shall be endowed of a Moiety, &c. 4 *Ed.* 3. 32. *Bro. Custom*, 58. *Fitzb. Dower*, 113.

But this must be taken with a Distinction, that it be not Rent-Service Parcel of a Manor originally holden by Knight-Service, which will descend with the Manor :

For tho' the Tenancy be of Gavelkind Nature, yet the Rent-Service by which such Tenancy is holden may well be descendible at the Common Law. 7 *Ed.* 3. 38. *Fitzb. Avowry*, 150. *Lamb. Peramb.* 548.

Lord, Mesne and Tenant, and the Land is holden in Gavelkind, yet the Rent and Service of the Mesne may be holden at Common Law, unless it is especially shewn that the Rent is of the same Nature as the Land is. 21 *H.* 6. 11. *b.*

Nor does there ever seem to have been any Doubt concerning a Rent reserved on a Gift in Tail, or Lease for Life or Years of Gavelkind Lands, but as incident to the Reversion it shall follow the Nature of the Lands. 22 *Ed.* 4. 10. *b.* *Dyer* 5. *b.*

But the Great Question has been concerning a Rent-Charge out of these Lands commencing by Grant within Time of Memory.

The Authorities which make for the Heir at Common Law are these.

Rent or Common out of Land in Gavelkind, *Borough English*, & *hujusmodi*, if of ancient Time, shall be of the Nature of the Land, as that a Wife shall be endowed of a Moiety; but otherwise it is of a Rent newly

ly granted. 4 Ed. 3. 32. Bro. Custom, 58. Chap. V.
Fitz. Dower, 113.

Trin. 26 H. 8. 4. b. Shelley Just. holds, that a Rent granted out of Gavelkind Land shall not be partible among the Males, because the Prescription is the Thing which makes the Land of such Tenure, and this ought to be for Time out of Mind, and therefore cannot take Place in this Rent newly commenced; and the Prescription of Gavelkind also is that the Land is holden in Socage, and this Rent does not lie in Tenure, and therefore the Prescription cannot serve for it. But *Norwich* and *Fitzherbert, Justices*, held the contrary; and *Fitzherbert* said, that he had known four Judgments in Point that the Rent shall follow the Nature of the Land.

And the very Term after *Shelley* maintains his former Sentiments, and says, that he had always been of Opinion, tho' *Fitzherbert* thought the contrary, that a Rent-charge out of Gavelkind Land is not departible; but that if the Rent is reserved on a Lease, so that it is incident to the Reversion, per-adventure it is departible. *Dyer 5. b.*

A Custom never extends to a Thing newly created, and therefore if a Rent be granted out of Gavelkind Lands, or *Borough English*, the Rent shall descend according to the Course of the Common Law. *Co. Copyb. Sect. 33.*

The Authorities to the contrary are these.

Inter Plac. Assisarum in Com. Kanc. 10 Ric.

2. An Assise of *Mortdancestor* brought by *Stephen atte Cherche, Clerk*, and *Nicholas* his

M

Bro-

Book I.

Brother, as Heirs to their Father *Stephen atte Cberche*, against *Tho. Northbryn* and others, for a Rent-charge of a third Part of three Bushels of Salt issuing *de terris, tenementis, salinâ, &c.* in *Hertye*; the Assise being taken by Default, the Recognitors find that the Father of the Plaintiffs died seised in Fee of the said Rent, and that the Plaintiffs are his next Heirs: ‘*Quæsitum iisdem Recognitores qualiter iisdem Stephanus atte Cberche Clericus, & Nicholaus sunt propinquiiores hæredes ipsius Stephani atte Cberche patris, dicunt quod tenementa, unde redditus ille provenit, sunt de Gavelkynde & partibilia inter masculos, & a toto tempore exstiterunt, & redditus ille est ejusdem naturæ, & esse debet secundum Consuetudinem tenuræ illius: Quæsitum iisdem Recognitores cujusmodi redditus, redditus ille est, dicunt quod est redditus oneris.*’ And then they find the Plaintiffs Title to the Rent. ‘*Quæsitum iisdem Recognitores si redditus ille aliquo tempore post donum prædictum partitus fuit inter masculos, dicunt quod post donum prædictum non fuerunt duo filii simul alicujus antecessorum prædictorum Stephani atte Cberche Clerici, & Nicholai, inter quos partiri potuit, præter eosdem Stephanum & Nicholaum, (and then they find the Damages) Et viso & diligenter examinato veredicto prædicto, Consideratum est quod prædictus Stephanus atte Cberche, Cler. & Nicholaus recuperent seisinam suam de redditu prædicto, &c. & damna sua, &c.*

Rent-

Rent-charge, Rent reserved, &c. shall follow the Nature of the Land. 22 *Ed.* 4. 10. *b.*

If a Rent be granted in Fee out of Gavelkind Land, it shall descend to all the Males.

Lamb. Peramb. 606.
147.

Said by *Fitzberbert* and *Pollard*, Justices, and not much denied, that if Rent is granted out of Land which is Customary, as *Borough English* or Gavelkind, or where Dower is of a Moiety, & *hujusmodi*, the Rent shall be of the Custom and Nature of the Land, tho' the Rent is granted out of the Land within Time of Memory, or at this Day. 14 *H.* 8. 7 & 9. *Bro. Rents*, 20. *ibid.* *Custom*, 65.

And the Opinion of *Fitzberbert* and *Norwich*, 26 *H.* 8. 4. *b.* just before cited.

In Ancient Boroughs, where Lands and Tenements are deviseable by Will, a Man seised of a Rent-Service, or Rent-Charge may devise it. *Litt. Sect.* 585. 1 *Inst.* 111. *a.*

But this Question is at length put in Peace by a later Determination:

The Question was, whether a Rent-charge granted out of Gavelkind Lands to a Man and his Heirs should go to the Heir at Common Law, or be partible among all the Sons; and after solemn Argument by two *Kentish* Council, and Consideration of all the Cases, the Court held that the Rent ought to descend to all the Brothers according to the Descent of the Land, because the Rent is Part of the Profits of the Land, and issues out of the Land. *Randall* and *Jenkins*, 1 *Mod.* 96. 2 *Lev.* 87. 3 *Keb.*

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214. cited 1 *Vern.* 489. The same Point was ruled in the Case of *Stokes and Verrier*, 3 *Keb.* 292. 1 *Mod.* 112. on the Authority of the foregoing Case. And the same Thing is affirmed by *Holt, Ch. Just. Salk.* 244.

3 *Lev.* 370.
Carth. 307.

And in 2 *Lutw.* 1205, 1210. *Osmer and Sheafe*, is a Conufance made in the Name and Right of a younger Brother for his Purparty of a Rent-charge granted to his Ancestor in Fee out of Lands in Gavelkind, and Judgment for the Conufant. Indeed the Reporter properly doubts whether the Conufance being for Part of the Rent only was good: For it is adjudged in the Case of *Page and Stedman, Carth.* 364. that Coparceners cannot sever, but must join in Avowry for Rent, and where one Sister distrains she must avow in her own Right, and likewise make Conufance as Bailiff to her Sister for the entire Rent, and not for a Moiety only in her own Right. And the like Determination is concerning Jointenants of a Rent-charge. *Carth.* 328. *Pullen and Palmer*. And the same Rule is allowed between Parceners of a Seignior in Gavelkind distraining for Rent-Service. 7 *Ed.* 3. 38, 39: *Avowry* 150.

But if the Rent be issuing by one entire Grant out of Lands of different Natures, they who claim under the Custom will have no Share in the Inheritance, but the Common Law Descent will be preferred to the whole as the most worthy.

Rent

Rent *granted* out of Land at Common Law and *Borough English*, descends according to the Common Law. 1 *And.* 191. *obiter.*

If Rent is *granted* out of Land of the Custom of Gavelkind, and out of Land at Common Law, and the Grantee dies having divers Sons, the eldest only shall have the whole Rent. *Marginal Notes to Dyer, 5. b.* And in the Case of *Randal* and *Roberts*, *Noy* 15. It was adjudged in *Replevin*, that if a Man seised of Land in *Soke-Fee* [which is to be understood Land at Common Law, *per Hale Ch. 7. 3 Keb. 215, 216.*] and Gavelkind, grants a Rent-Charge out of them to *B.* in Fee, and *B.* dies, having Issue three Sons, the eldest only shall have all the Rent.

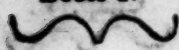
But if Rent is *reserved* out of Land of two Customary Natures, as if a Man make a Lease for Years of two Acres of Land, one in Gavelkind and the other in *Borough-English*, and has Issue two Sons, and dies, the Rent shall be apportioned, because it descends to them by Course of Law. *Dyer 5. a.* Tho' the true Reason seems to be, that it is incident to the Reversion.

And indeed the Law will be the same equally in the Case of a Rent *reserved* out of Gavelkind Lands, and Lands at Common Law, as such Rent is incident to the Reversion, and apportionable on the Severance of it either by Act of Law, or Act of the Party.

Co. Litt. 148.
a. 215. a.

A Man seised of two Acres, the one in Fee, the other in *Borough English*, has Issue two Sons, and lets both Acres for Life or for

Book I.



for Years, rendering Rent, with Condition of Re-entry; the Lessor dies; by this Descent which is an Act in Law, the Reversion, Rent and Condition are divided. 4 Rep. 120. *b. Dumpor's Case*, 1 Roll. Rep. 331.

Of Tithes
out of Gavel-
kind Lands.

Parsonages, Tithes, &c. that came to the Crown by the Statutes for the Dissolution of Monasteries, &c. are made by those Statutes and that of 32 H. 8. 7. in the Hands of Laymen, temporal Inheritances, and Husbands may be Tenants by the Curtesy, and Wives endowed of them. *Co. Litt.* 159. Upon which may possibly arise a Question of some Importance, whether Tithes impropriate issuing out of Gavelkind Lands shall descend to the eldest Son, or go according to the Custom of the Lands out of which they arise. And the like Doubt may be made concerning Dower, and Tenancy by the Curtesy. But it will be very difficult to maintain that these new Inheritances can be directed or controuled by the Custom, since they were within Time of Memory. Duties merely Ecclesiastical, collateral to the Estate of the Land, and are in no Part of the old Lay-Fee.

1.1 Rep. 13. b.

*See 1. Hughes's
Abridg^m. 54b.*

I can find no Case in the Books in Point to this Question, (possibly because never accounted of any Difficulty) save one in *Hughes's Abridg-ment*, *Title Customs*; which Book I cite not as of any Authority, but only as it may occasion a further Search, if it should ever be thought proper to litigate this Point. The Name of the Case is omitted, but it is *Mich.* 10 Jac. 1. A Man is seised of Tithes of Corn

of the Nature of Gavelkind.

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Chap. V.

Corn arising out of the Manor of *D.* which is *Borough English*; the Question was who should have them, the Elder or Younger Son: The Opinion of the Court was that the Eldest should have them, because Tithes do not come naturally of the Land, but by manual Occupation. Also of Common Right Tithes are not an Inheritance descendible, and by the Statute of Monasteries it is only that they are descendible to Heirs.

Before I conclude this Chapter, I shall take Notice how generally this Custom of Gavelkind formerly obtained throughout the whole County of *Kent*; for tho' it is confined to Tenements of Socage Tenure, yet there were fewer Lands anciently holden by Knight-Service in this than perhaps in any other County of the Kingdom; inso-much that it is said in *Pasc. 18 Ed. 2. Mayn. 610.* That *all* the Land in *Kent* is holden in Socage. But this is not to be taken literally, for it is plain by the *Militēs Archiepiscopi* in *Domesday*, that Military Tenures were introduced into this County soon after the Conquest: And there are frequent Instances on Record in the *Kentish Iters* of Lands holden by Knight-Service; as in *39 H. 3. Rot. 18. in dorso. 43 H. 3. Rot. 4. 55 H. 3. Rot. 20. 38. in dorso. 52. in dorso. 21 Ed. 1. inter Plac. Coron. Rot. 41. and Hill. 10 Ed. 1. C. B. Rot. 27.* So in this very Reign of *Edward the Second*, *Mich 9 Ed. 2. C. B. Rot. 240. Ante 56.* And in *Itin. Kanc.*

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Kanc. 6 Ed. 2. Plac. Coron. the Juries of the several Hundreds throughout the County, are charged to enquire *de feodis*, and accordingly find who held Lands in *Capite* within their several Districts, as may be seen *Rot. 19, &c.*

However it appears by *Stat. 18 H. 6. 2.* that at that Time the Number of Military Tenants in this Shire was very inconsiderable, the Act taking Notice that there were within the County of *Kent* but thirty or forty Persons at most, which had any Lands or Tenements out of the Tenure of Gavelkind, because the greater Part of the County, or *well nigh all*, was of the Tenure of Gavelkind.

Indeed the Quantity of Lands exempt from this Custom as to the Quality of Partition was much encreased by the disgavelling Statutes; and this perhaps may have given Occasion to a common Mistake, which I have met with among Strangers to this County, that there now remains in it but little Land of the Nature of Gavelkind.

1 Sid. 138.
*Wisenan and
Cotton.*

But the Presumption of Law, that all the Lands in this County are Gavelkind, is a great Friend to the Custom; and if we consider the Difficulty complained of even in the last Age, and now grown much greater, of proving what Estates the Persons comprehended in the Disgavelling Statutes were seised of at the Time of making those Acts, together with that of shewing what Lands were formerly Knight-Service,

Service, which is a Difficulty encreasing every Day since the Abolition of Military Tenures, and the Expence attending the Search of Records for Evidence of this *Kind*, I believe I should not seem much mistaken, were I to assert, that there is now near as much Land in this County subject to the Controul of the Custom, as there was before the Disgavelling Statutes were made.

C H A P. VI.

Of the Nature of Gavelkind in Point of Descent and Partition; and of the Remedies for and against Parceners by the Custom.

Ante 41.

HAVING shewn in general what Lands within the County of *Kent* are of the Nature of Gavelkind, I shall now enter more particularly into the several Properties of the Custom, and in this I shall follow the Order of the Division before made, first treating of the *general*, and then of the *special* Customs: And Partibility being the primary and more eminent Quality of Gavelkind, I shall in the first Place speak of that, and its Consequences, *viz.* The Remedies given by Law to or against Parceners by the Custom, either for the Land, or by Reason of the Land.

Descent of
Lands in Gavelkind in the
Right Line.
*Customal of
Kent* 574.
Litt. sect. 265.

The Descent of Lands in *Gavelkind* in the Right Line is so well known to be among all the Sons, and in Default of them to the Daughters, that it is needless to multiply Authorities concerning it; especially as it is taken Notice of by the Statute 17 *Ed.* 2. *De Prærog. Regis.* c. 16. "In *Kent* in Gavelkind all Heirs Males shall divide their Inheritance, and likewise Women; but Women shall not partake with Men."

But

But tho' Females claiming in their own Right are postponed to Males, yet it is to be understood that they may by Representation inherit together with them. For it is not to Descents according to the Course of the Common Law only that the Right of Representation is confined, but it holds also in Inheritances descendible according to Custom; and indeed has been taken Notice of by the Laws of all Countries: And therefore, if a Man has three Sons, and purchases Lands in Gavelkind, and a younger Son dies in the Life of his Father leaving Issue a Daughter, without Doubt the Daughter shall inherit the Part of her Father; and yet she is not within the Words of the Custom (*inter hæredes masculos partibilis*) for she is no Male, but the Daughter of a Male coming in his Stead by Representation. Indeed, had the Purchase been to the Father and the Heirs Males of his Body, the Daughter had been excluded *per Formam Doni*; but the Custom making the Land descendible to the Heir Male, makes Room for the Representative of him. *Per Holt*, Ch. Just. in delivering the Opinion of the Court in the Case of *Clement and Scudamore*, 6 Mod. 121. *Salk.* 243. 1 *Peere W.* 63.

Chap. VI.
By Representation.

2 Inst. 595.
Lamb. Peram.
626.
Somn. 7.
Dyer 237.
Post.

And the same Fiction of Representation holds in *Borough English*; for there is no Difference between Gavelkind and *Borough English* but in the Quantity of the Land taken by the Heir; in Gavelkind each Son taking an equal Part, but here the youngest Son takes the whole, which will not vary the Reason in Construction for the Custom:

Book I.

And since this Custom alters the Descent from the Eldest to the Youngest Son, there is the same Reason that the Representative of the Youngest shall take, as there is at Common Law for the Representative of the Eldest. *Ibid.*

And tho' the Father purchased not the Lands in Gavelkind till after the Death of one of his Sons, yet the Representative of such Son shall be admitted in his Stead; as appears from the principal Case of *Clement and Scudamore*, which was this: *A.* had five Sons, and the youngest died in the Life of his Father, leaving Issue a Daughter, after which the Father purchased Copyhold Lands of the Nature of *Borough English*, which by the Custom were descendible to the Youngest Son and his Heirs; and the Court upon Consideration were of Opinion that the Daughter of the fifth Son should inherit *Jure Representationis*, for the Custom having made the youngest Son Heir, the Law implies all necessary Incidents and Consequences in Point of Descent. *Salk.* 243. 6 *Mod.* 120. 1 *Peere W.* 63.

In the collateral Line.

Nor is the partible Quality of Gavelkind Land restrained to the Right Line only, but in Default of lineal Heirs, by the Custom of *Kent* when one Brother dies without Issue all the Brothers shall inherit. *Co. Lit.* 140. *a.* *Skin.* 385. *Sonn.* 7. *Spelm. Glossary sub verbo Gaveletum.* 23 *Aff.* 12. And this was taken for granted in the Case of *Gouge and Woodwin*, *Mich.* 8 *Geo.* 2. Where the Contest was between two Brothers on the Death of a Third.

And

In Point of Descent and Partition.

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And in Default of Brothers their respective issue shall take *Jure Representationis*, but then the Nephews succeeding with their Uncle the Descent is *in Stirpes*, and not *in Capita*. *Somn. 7.* And so from the Nature of the Thing it must be where the Sons of several Brothers succeed, no Uncle surviving; for tho' in equal Degree, they stand in the Place of their respective Fathers.

This Extension of the Customary Descent to the collateral Line is a greater Favour than is allowed to other Customs; for *Borough English* is confined to the youngest Son only, and if he die without Issue, the youngest Brother shall not inherit Land of that Nature, except it be by some special Custom, for Customs ought always to be taken strictly. *Co. Litt. 110. b. 1 Roll's Abr. 623. A. 2. Godb. 166. 2 Roll. Rep. 368. 4 Leon. 242. Cro. Jac. 198. Bailey and Stevens. And Cro. Car. 411. and W. Jones 361. in Reeve and Malster agreed by the Court. Which Authorities are sufficient to overthrow the Saying of Williams Justice to the contrary in 1. Bulst. 93.*

And if the youngest Son having Lands in *Borough English* die, leaving only Nephews, the eldest Nephew shall take. *1 Roll's Abr. 624. pl. 2.*

So if the Custom of a Copyhold be that the eldest Daughter, in Case there be no Sons, shall take the whole, the eldest Sister is not within the Custom. *Chapman's Case, 2 Roll's Rep. 368. Godb. 116. Rapley and Chapman. Nor the eldest Aunt. 1 Roll's Abr. 623. A. 1.*

And

Chap. VI.

26 H. 8. 4. b.

Skin. 385, 562.

Bewiston and

Huffey.

See

See this case cited by Judge
as an authority in 1. Term Rep.
B-R-A 76

Book I.

And tho' the Custom be that the eldest Sister shall inherit, yet it extends not to the eldest Aunt or Niece. 4 Leon. 242. Ratcliffe and Chaplin. Godb. 166. S. C.

Of Gavelkind
Lands in Tail.

Neither is our Custom of Gavelkind confined to Inheritances in Fee-simple only; for tho' an Estate-Tail is a new Kind of Inheritance introduced within Time of Memory by the Statute *De Donis*, yet if a Man die seised of Lands in Gavelkind in Tail, whether general or special, all the Sons shall inherit together as Heirs of the Body. 11 Ed. 3. Formedon 30. 11 H. 6. 43. b. Litt. Sect. 265. 26 H. 8. 4. b. 1 Rep. 101. a. 103. a. Noy 106. For it is Part of the old Fee-simple, tho' the Tail be created *de novo*. 1 Mod. 196.

+ Nor will the
express words direc-
ting a descent
according to the
common law con-
trol the descent
by custom. Dy. 179.
b.

And in like Manner, if Lands in *Borough English* are given to a Man and the Heirs of his Body, the youngest Son shall take. 11 Ed. 3. Formedon 30. Litt. Sect. 603. Co. Litt. 110. b. Noy 106. Weeks and Carvel.

But a special Custom in *Borough English* Lands, that the youngest Son shall take an Estate in Fee, but the Eldest an Estate Tail, is a good Custom. March 54. Chapman and Chapman.

Devise of Ga-
velkind Lands
to three Bro-
thers, &c.

One *Fairman* seised of Gavelkind Lands had three Sons, and devised Part to one, Part to another, and Part to a third, and if any of them died without Issue, then the others to be his Heir; this was adjudged an Estate Tail in each, Remainder over in Fee by Reason of the Word Heir. Sparke and Purnell, Moor 864.

In

In Point of Descent and Partition.

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In *Dyer* 133. pl. 5. is put this Case: A Man seised of Lands in Gavelkind by his last Will devises it to Husband and Wife for their Lives, Remainder *Proximo Hæredi Masculo de corporibus suis legitime procreato imperpetuum*; and afterwards the Husband and Wife have issue three Sons, and die; if the eldest Son shall have the Whole, or in Common with his Brothers, was the Question:

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Whether Gavelkind Lands devised to a Man and his Wife for their Lives, Remainder to the next Heir Male of their Bodies forever, is a Devise in Tail?

By a Manuscript Note which I have seen of this Case, it came in Debate on a Replevin brought by *Antony May* against *John Milton* and *John Hammond*; and *Portman, Cb. J.* and *Whiddon, Just.* were of Opinion that all the Sons should inherit; but *Dalison Just.* held that the eldest Son should take the whole by Purchase, and have a Fee by Reason of the Word *imperpetuum*.

The Question turns upon this, whether the Words of this Devise create an Estate in special Tail in the Husband and Wife; for then all the Sons may inherit; but if on the contrary the Words *next Heir Male* being in the singular Number, are to be taken in this Will, as they would in a Deed, to be only Words of Purchase, there can be no Doubt but the eldest Son will take the whole.

It is certain such a Devise of Lands descendible according to the Course of the Common Law would create an Estate Tail in the first Taker, as appears by the following Cases:

Devise to a Man for Life, Remainder to the *next Heir Male*, and for Default of such Heir

Book. I.

Heir Male to remain, adjudged an Estate Tail. *Burley's Case*, cited 1 *Vent.* 230.

Devise to *Serjeant Miller* and his Wife for their Lives, Remainder to *the next Heir Male* of their two Bodies; held, that this was a Devise in Tail; for a Devise to the Heir Male is a Devise in Tail, unless there are Words of Limitation superadded so as to bring it within the Reason of *Archer's Case* (1 *Rep.* 66.) But the Words *First, Next*, or *Eldest*, or any like Words superadded, make no Difference. *Miller and Seagrave*, Mich. 10 Geo. 1. B. R.

Sir Tho. Trollop devised the Manor of *A.* to his first Son *William* for Life, Remainder to the Heirs Males of his Body, Remainder to his second Son *Thomas* for Life, and after his Death to the *first Heir Male* of his Body, Remainder to his third Son *Christopher* and the Heirs Males of his Body, Remainder in like Manner in Tail Male to the fourth, fifth, &c. Sons: The Court held that the Words *Heir Male* were to be understood collectively, and that *Thomas* the second Son took an Estate Tail, it appearing that such was the Testator's Intention by the other Devises; and this stands distinguished from *Archer's Case*, no Limitation being superadded to the Words *first Heir Male*, and the Word *First* shall be understood first in Order of Succession from Time to Time. *Dubber* on the Demise of *Trollop v. Trollop*, East. 8 Geo. 2. B. R. which affirmed the Judgment of C. B.

And, it seems, with equal Reason may the Word *Heir* be understood as *Nomen Collectivum*, if the Lands be Gavelkind, as all the

*see 1. Aff. 42.
h.c. 2. 11.*

in Point of Descent and Partition.

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the Sons are in Judgment of the Law but one Heir : And then the Words in the principal Case will create an Estate in Special Tail in the first Takers, which will descend to all the Males ; for the Law will without Difficulty reject the Word *next*, in Favour of the Customary Inheritance, or it may naturally enough be taken to signify the nearest in Course of Succession from Time to Time. *

Nor are Estates of Inheritance only trans- Estates *pur au-*
mitted to all the Sons according to the Cu- ter *vie* of Ga-
stom, but Freeholds descendible are also of velkind Lands.
the same Nature ; as if a Lease is made of Gavelkind Land to a Man and his Heirs *pur auter vie*, the Heirs by the Custom, after the Death of their Father, &c. shall be the special Occupants: In like Manner, as if Lands of the Nature of *Borough English* be letten to a Man and his Heirs during the Life of J. S. and the Lessee dies in the Lifetime of J. S. the youngest Son shall enjoy the Lands. *Co. Litt. 110. b. Salk. 244. per Holt.* And the same Point was adjudged between *Baxter* and *Dowdeswell*, by Lord *Hale* and the Court of B. R. 2 *Lev. 138. 3 Keb. 475, 486, 498.* And cited in 2 *Vern. 226.* tho' objected that it was only a special
O Li-

* In *Lovelace's Case*, cited *Moor 371.* A Devise of Gavelkind Land to a Man and his *Eldest* Issue Male (he having no Son at that Time) was adjudged no Estate Tail, but for Life only. But the Case is reported in several other Books. *Cro. Eliz. 40. 2 Leon. 35. 1 And. 132. Sav. 75.* in none of which is any Notice taken that the Lands were Gavelkind.

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Limitation to prevent an Occupancy ; for he takes as Heir.

Of Gavelkind
in Copyholds.

If Copyhold Lands descendible after the Manner of Gavelkind are surrendered to the Use of a Man and his Heirs who dies before Admittance, yet the customary Descent shall take Place ; according to the Reason of the Case of *Barker and Denham*, 1 *Mod.* 102. 1 *Vent.* 261. Copyhold Land of the Custom of *Borough English* was surrendered out of Court to the Use of a Man and his Heirs ; the Surrenderee died before Admittance, leaving two Sons ; and the Opinion of the Court was that the Right should descend to the youngest, according to the Custom.

2 *Sid.* 61.

Style 145. S.C.

argued, but

not adjudged.

But otherwise it is if the Custom be more Special, that the Land of every Tenant *dying seised* be divided among the Sons. In the Case of *Fane and Barr*, *Hill.* 1659. *Rot.* 779. The Custom was that the Copyhold Land of every Tenant *dying seised* descended to the youngest Son : A Surrender was made to the Use of *A.* and his Heirs ; *A.* died before Admittance : And it was agreed the youngest Son should have inherited, if *A.* had been admitted ; but in this Case *A.* not having been admitted, it was adjudged that the eldest Son should inherit, and that by Reason of the Strictness of the Custom which required a Seisin and a *dying seised*. But the Court said it had been otherwise had this Land been found to be of the Custom of *Borough English* or Gavelkind. Cited by *Holt Ch. J.* in the Case of *Clement and Scudamore*, *Salk.* 243.

A

A Man seised of Copyhold Lands descendible after the Manner of Gavelkind, devised them to his eldest Son, but without a Surrender to the Use of his Will; and Equity supplied this Defect, being in Favour of the eldest Son, who was as much entitled to this Relief in the present Case, as a younger Son is, where Copyhold Lands descendible at Common Law are devised to him. 2 Vern. 163. *Bradley and Bradley*.

But as Equity will not supply the Want of a Surrender to the Use of the Will in Favour of younger Children, if it would totally disinherit the Heir at Law, or put the Younger in a better Condition than the elder Brother; so on the other Hand, where a Father devised a Copyhold of the Tenure of *Borough English* to his eldest Son, and devised Houses in *London* to his youngest Son, and died without having surrendered to the Use of his Will, being prevented by the Plague: And the Houses in *London* intended as a Provision for the youngest Son were soon after burnt down, he being then an Infant, and never having entered thereon, or received any Part of the Profits; the Court, as the Case was circumstanced, refused to supply the Defect of a Surrender. *Cooper and Cooper*, 2 Vern. 265.

I have seen a remarkable Record of a Plea between *Bedyll* and *Crouther*, B. R. Mich. 11 H. 8. Rot. 88. wherein the Defendant pleads that the Lands are of the Nature of Gavelkind in the County of *Kent*, and "that it is, and from Time whereof the Memory of Man is not to the con-

Whether one
Parcener of
the Half.
Blood of
Lands in Ga-
velkind shall
inherit to the
other.

" trary, in the said County of *Kent* by the
 " Custom of the said County has been used,
 " that whensoever two Heirs Males Copar-
 " ceners of the *Half-Blood*, of whatsoever Pa-
 " rent begotten, have inherited any Lands or
 " Tenements of the said Nature or Tenure
 " of Gavelkind in the said County, and ei-
 " ther of these Heirs has died seised of his
 " Purparty of such Hereditaments without
 " Heir of his Body, then the other sur-
 " viving Heir, Coparcener of the said Heir
 " so dying, might inherit, and for the whole
 " Time aforesaid was inheritable, has inhe-
 " rited, and ought to inherit according to
 " the Custom the Purparty of all the Lands
 " and Tenements of the said Nature or
 " Tenure of Gavelkind of the said other
 " Heir, so without Heir of his Body dying."
 And then makes Title to the Lands according-
 ly. And the Plaintiff takes Issue on this
 Custom, which the Court after mature De-
 liberation, and having advised with the Ju-
 stices of *C. B.* sent, as it concerned the
 Commonalty of *Kent*, to be tried by a Jury
 of the Body of the County : But there is no
 Verdict, nor further Proceedings entered on
 the Roll.

Post. lib. 2. c.
 7.

1 Roll. Abr.
 628. pl. 14.

V. M. 19 Ed.
 2. Mayn.
 628. and
 Fitz. *Quare*
Impedit, 177.

But still this Question may be settled by
 other Authorities ; and as the Half Blood is
 an Impediment by the Common Law to the
 Descent of the Purparty of one Female Par-
 cener to her Sister by a different Venter, e-
 qually as in other Cases, notwithstanding a
 Notion that anciently prevailed to the con-
 trary ; so the following Cases will shew it to
 be the same as to Parceners by the Custom.

' *Itin.*

in Point of Descent and Partition.

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Itin. Kanc. 55 H. 3. Inter Plac. de Jura-
tis & Assis de Civitate Cantuar. rot. 6.

Assise of Mort-
dancefor.

Jurata loco Assisæ Mortis Antecessoris, se-
cundum Consuetudinem Civitatis Cantuar.

venit recognitura si Henricus filius Bretun
del Marreys, frater Johanne uxoris Johannis

fili Will'i, & Emmæ uxoris Roberti de
Kingston, fuit seifitus in Dominico suo ut

de feodo de medietate Messuagii ac viginti
solidorum redditus, & decem acrarum ter-

ræ in Suburbiis Cant. & medietate quatuor
acrarum terræ cum pertinentiis in T. die quo,

&c. & si, &c. Quas medietates prædictorum
Messuagii redditus & terræ Thomas filius

Will'i Culbill & Henricus frater ejus tenent:
Qui veniunt & dicunt quod Jurata non

debet inde fieri, quia dicunt, quod præ-
dictus Henricus, de cujus morte, &c. obiit

Tenants plead
that they are
Brothers and
Heirs.

seifitus de prædictis Tenementis, & quod
ipsi post mortem prædicti Henrici intra-

verunt in prædicta tenementa ut fratres
& hæredes ipsius Henrici, unde petunt ju-

dicium si Assisa jaceat inter ipsos deficut
ipsi & prædictæ Johanna & Emma cla-

mant per unum & eundem descensum.

Et Johannes & Johanna, Robertus &
Emma dicunt quod prædictum Messuagium

Reply, that
the Plaintiffs
are Sisters of
the whole, and
the Tenants
but Brothers
of the half
Blood.

& redditus fuerunt jus & hæreditas cu-
jusdam Christianæ, quæ habuit duos viros,

de quorum primo habuit prædictum Tho-
mam & Henricum, & de secundo prædic-

tum Henricum, de cujus morte, &c. & præ-
dictas Johannam & Emmam; & dicunt

quod prædictus Henricus frater ipsarum
Johannæ & Emmæ fuit in seifinâ de Me-

* 2^u. How
Henr. was en-
titled to above
mine a third Part.

dietate prædicti Messuagii & redditus no-
mine

Book I.

Judgment for
the Plaintiffs.

Assise.

Tenant
pleads that
H. died sei-
fed as of his
Purparty in
Gavelkind,
and she is
Heir of the
whole Blood,
and the Plain-
tiff is by ano-
ther Venter.

mine pro partis suæ cum prædictis *Thoma*
& *Henrico*, & inde obiit seifitus; unde
dicunt quod ipsæ *Jobanna* & *Emma*
sunt hæredes propinquiores prædicti *Henrici*
fratris sui, ex quo ipsæ sunt de eodem patre
& eadem matre, quam prædicti *Thomas* &
Henricus qui tantummodo sunt fratres ejus
ex parte matris, desicut idem *Henricus* fra-
ter ipsorum obiit seifitus de prædictis me-
diatibus prædictorum Messuagii & red-
ditus. Et prædicti *Thomas* & *Henricus*
non possunt hoc dedicere; Ideo Considera-
tum est quod prædicti *Jobannes* & *Joban-*
na, *Robertus* & *Emma* recuperent seifinam
suam de prædictis mediatibus messuagii
& redditus, & *Thomas* & *Henricus* in miâ.
Itin. Kanc. 6 Ed. 2. Rot. 18. in dorso.
Assisa venit recognitura si *Willus* filius
Willi de *Horne* & *Elena* uxor ejus, &c.
injuste disseisiverunt *Jobannem Heymes* de
Fresingbeye de libero tenemento suo in *Ten-*
terden, &c. unde queritur quod disseisive-
runt eum de uno Messuagio & quinq; acris
terræ.
Idem *Willus* & *Elena* respondent ut
tenentes, & dicunt quod tenementa posita
in visu non continent in se nisi unum mes-
suagium & quatuor acras & tres rodas ter-
ræ, & quod Assisa non debet inde fieri,
&c. quia dicunt quod tenementa illa si-
mul cum aliis tenementis dudum fuerunt
in seifinâ cujusdam *Hamonis* de *Fresingbeye*
ut jus ipsius *Hamonis*, qui habuit duas ux-
ores, scil. quasdam *Mabillam* & *Margeriam*,
& de prædictâ *Mabillâ* procreavit ipse præ-
dictum *Jobannem*, qui nunc queritur, & de
præ-

prædicta Margeria procreavit quendam Robertum & prædictam Elenam, & dicunt quod post mortem prædicti Hamonis, qui de prædictis tenementis obiit seifitus in Dominico suo ut de feodo, &c. successerunt in iisdem tenementis prædicti Johannes & Robertus ut filii ejus & hæredes, &c. ita quod tota Hæreditas, &c. partita fuit inter ipsos Johannem & Robertum; & quod tenementa nunc posita in visu, &c. assignata fuerunt in propartem ipsius Roberti, qui inde obiit seifitus, &c. cui successit in eisdem quidam Hamo ut filius ejus & hæres, qui inde obiit seifitus, &c. post cujus mortem sine hæredibus de se, &c. resortiebatur Jus prædictæ Elenæ ut amitæ & hæredi, sorori prædicti Roberti patris prædicti Hamonis, &c. de sanguine integro, &c. unde petunt judicium, desicut idem Johannes est de alio ventre & non de sanguine integro ipsius Roberti.

Et Johannes Heymes bene cognovit quod tenementa prædicta simul cum aliis tenementis fuerunt in seifinâ prædicti Hamonis de Fresingbeye, & quod eadem tenementa partita fuerunt inter prædictum Robertum & ipsum Johannem, sed dicit quod tenementa ista in visu posita, & unde quer, &c. assignata fuerunt eidem Johanni in propartem, &c. & idem Johannes inde fuit in seifinâ ut de libero tenemento suo per assignationem prædictam, quousque prædicti Willus & Elena & alii in brevi nominati ipsum inde injustè desseifiverunt, & hoc petit quod inquiretur per Assisam, & Willus & alii similiter.

Plaintiff replies, that the Premises were assigned to him as his Purparty, and not to H.

Issue thereon.

Of the Nature of Gavelkind

Verdict and
Judgment for
the Tenant.

Postea venerunt xii. Recognitores qui dicunt super sacramentum suum quod prædicta tenementa, quæ prædictus *Johannes Heymes* posuit in visu suo, & de quibus queritur, &c. assignata fuerunt prædicto *Roberto* in partem suam, & non prædicto *Johanni*, unde dicunt præcise quod *Willus* & alii non disseisiverunt prædictum *Johannem* sicut queritur. Ideo Consideratum est quod prædictus *Willus* & alii eant sine die, & prædictus *Johannes* nil capiat, &c. sed in m^{ia}, &c.

In an Affise, *Plac. Ass. in Com. Kanc. 3 Ed. 2.* by *Robert Bishop* and *Godeline* his Wife against *John* Son of *Edm. de Herberdefeild*, &c. for Lands in *Staplehurst*, &c.

Affise.

Verdict, that the Plaintiff is Sister of the whole, and the Tenant Brother but of the half Blood to *W.* who died seised of the Premises as of his Parturty in Gavelkind.

N B. A Verdict of much the same Nature was found between the same Parties in an Affise brought Anno 35 Ed. 1. and occurs Mich. 3 Ed. 2. Coram Rege, Rot. 105. Kanc.

Juratores dicunt super sacramentum suum, quod prædicta tenementa aliquo tempore fuerunt in seisinâ cujusdam *Edmundi de Hardchurche*, qui desponsavit quandam *Julianam*, & ex ea procreavit quendam *Willum* nomine & præfatam *Godelinam*, quæ modo queritur, quæ quidem *Juliana* postea obiit, post cujus mortem ipse *Edmundus* desponsavit quandam *Dyonisiam*, & ex eâ procreavit quendam filium *Johannem* nomine; & dicunt quod prædictus *Edmundus* postea obiit, post cujus mortem prædicti *Willus* & *Johannes* intraverunt in prædictis tenementis, & ea tenuerunt in communi secundum Consuetudinem de Gavelkynde per quatuor annos & amplius, & dicunt quod prædictus *Willielmus* postea obiit, post cujus mortem præ-

prædicta *Godelina* intravit in integro prædictorum tenementorum, ut soror & hæres prædicti Will'i ex eodem patre & ex eadem matre, & fuit seifita in communi cum prædicto *Johanne* fratre ejus de integro prædictorum tenementorum, quousque prædicti *Johannes* filius *Edmundi* & *Johannes Meylyeme* ipsam inde injustè disseisiverunt: Et ideo Consideratum est quòd prædicti *Robertus* filius *Roberti* & *Godelina* uxor ejus recuperent inde seisinam suam per visum Recognitorum, & damna sua, &c.

Judgment for the Plaintiff.

Having treated of the Sons Right to the Gavelkind Inheritance in its several Branches, it may be proper to shew the Remedies given by Law for the Recovery of that Right; the more briefly indeed, because some of them are at present disused.

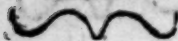
Remedies for Parceners in Gavelkind.

The Law has generally provided the same Writs and Remedies for Parceners by the Custom, as it has for Female Parceners.

As a *Nuper obiit*, where one of them enters on the whole Land on the Death of the Ancestor, and deforces the other, *F. N. B. 197. b.* if the Ancestor died seised: But if he died not seised, as if the Ancestor had made a Lease for Life, and one Coparcener enters after the Death of Tenant for Life upon the whole, then the other ought to sue a Writ of Right *de Rationabili Parte* against him. *F. N. B. 9. b.* And these Writs lie between none but Privies in Blood. *Ibid.*

But an Assise of *Mortdancestor* lies not for one Brother for Lands in Gavelkind against the other, because of the Privy of Blood, no more than for one Daughter against

Book I.



gainst another. *F. N. B.* 196. *L. Bract. lib.*
4. f. 261, 283. *Co. Litt.* 242. a.

These Writs *de Rationabili Parte* and *Nuper obiit*, lie only for one Parcener in Fee-simple against the other. *F. N. B.* 9. & 197.

In Tail.

But there are other Remedies proper to Parceners in Tail :

As a *Formedon*, where all the Sons are entitled to Gavelkind Lands entailed, as Heirs of the Body ; and the Writ shall be in the common Form, as the Writ of *Formedon* brought by Daughters, but by their Count they shall shew the Custom, and make the Descent to them as Heirs in Gavelkind. 11 *Ed.* 3. *Formedon*, 30. 11 *H.* 6. 44. b. *F. N. B.* 217. A.

And the same it is in *Borough English* ; the youngest Son taking the Lands entailed shall have a Writ of *Formedon* in the Common Form *ut quæ descendere debent* to the Demandant *ut filio & hæredi de corpore, &c.* but by the Count he shall alledge the Descent to him as youngest Son by the Usage. 11 *Ed.* 3. *Formedon*, 30. 13 *H.* 4. *Garrantie*, 94.

If Lands in Gavelkind be entailed, and descend to many Brethren as Heirs to their Father, and they make Partition betwixt them of the Lands, and afterwards one aliens his Part, and dies, his Heir shall have a *Formedon* of that which they held in Parts. *F. N. B.* 214. B. Where see the Form of the Writ.

And where two, Heirs in Gavelkind, hold Lands in Coparcenary without any Partition made, and one dies, leaving Issue, and the other

other enters and ousts the Issue, such Issue shall have a Writ of *Formedon* (in *Descender*) in the *Infimul tenuit* against the other Coparcener who deforced him of his Land. *F. N. B.* 216. *A.* Chap. VI.

And the same Writ lies against a Stranger where he ousts the Issue in Tail of one Parcener; or if the Father of such Issue had made a Feoffment in Fee to a Stranger; or for a Coparcener against a Stranger, who enters on the Death without Issue of the other Heir, who held the Lands undivided; or if such other Coparcener had aliened his Part to a Stranger in Fee. *Ibid.* And see there the Form of the Writ.

Lands in Gavelkind are granted, and rendered by Fine to a Man and his Wife, and the Heirs Males of their Bodies, and they die before Execution sued; the Heirs bring a *Scire Facias* against the Terretenants to have Execution, in the Writ they shall make the Descent to themselves generally, but in the Count they shall shew the Custom of *Kent*, and that the Lands descended to them as Heirs Males by the Custom. *11 H.* 6. 43. *b.* 44. *b.*

Other Remedies there are common to all Parceners: Remedies common to all Parceners.

All the Sons shall join in an Attaint, or Writ of Error, to reverse an erroneous Recovery of Gavelkind Lands. *Finch's Law*

16. *Lamb. Peramb.* ⁶⁰⁸/₃₄₂. The same shall the youngest Son have for *Borough English* Lands. *Finch's Law* 16. *F. N. B.* 21. *M.* *W. Jones* 361. 3 *Leon.* 261. 4 *Leon.* 5.

Of the Nature of Gavelkind

Book I.



Owen 68. for these follow the Nature of the original Action.

If there be a Brother and a Nephew, or others in different Degrees Parceners in Gavelkind, they are within the Statute of *Glocester*, c. 6. to join in a Writ of *Mortdancestor*. 2 *Inst.* 308.

Age:

Heirs in Gavelkind shall have their Age in all Actions, which in their Nature will admit of that Delay, in the same Manner as Female Parceners; and the youngest Son being Heir by the Custom of *Borough English* shall have his Age, or the Parol shall demur, as it would in the Case of Inheritances at Common Law. *Salk.* 243. 6 *Mod.* 122.

Aid.

One of the Heirs in Gavelkind after Partition being impleaded in a *Præcipe* for his Purparty shall have Aid of the other. 1 *Roll. Abr.* 182. pl. 17. 11 *H.* 4. 22. b. 17 *Ed.* 3. 2. b. 12 *Ed.* 3. *Voucher*, 113. and innumerable Instances in the *Kentish Iters*.

Of the Writ
and Manner of
Partition.

A Writ of Partition lies between Heirs in Gavelkind, as well as between Female Parceners, but in the Declaration they ought to make mention of the Custom *. *Litt. Sect.* 265.

Three

* Accordingly see the Form of the Declaration on a Writ of Partition between Parceners in Gavelkind. 1 *Brownl. Decl.* 150. *Herne* 531, 534, 537, 538. And see the Form of an Indenture of Partition by Consent between two Heirs in Gavelkind. *Rast. Ent.* 452.

Three Sons Heirs in Gavelkind in Kent, the youngest aliens his Purparty in Fee, the Alienee and the second Son join in a Writ of Partition against the Elder, and the Writ was *secundum formam Statuti* 31 H. 8. 1, which is for a Partition among Jointenants and Tenants in Common; And the Writ was abated by the Court; for the second Son is neither Tenant in Common, nor Jointenant with the Elder, and therefore he cannot join in this Writ with the Alienee; but they are entitled to several Writs of Partition, the Son to a Writ at Common Law, and the Alienee upon the Statute; but they cannot join. *Ballard and Ballard, Dyer* 128. *O. Bendl.* 20. *N. Bendl.* 42. *1 And.* 30. *Dyer* 243. *Co. Litt.* 175. b.

And in such Case the two Sons might have a Writ of Partition at Common Law against the Alienee, but not upon the Statute. *O. Bendl.* 20. *N. Bendl.* 152.

And if two Coparceners join against the Alienee in a Writ of Partition at Common Law, and one of them does not proceed, yet he may be summoned and severed, and his Part shall be parted and severed, as well as the other Parts. *Dyer* 243. The Reporter indeed adds a *Quere* to this, but, as it seems, a little unnecessarily; for there can be no Colour to say that the Nonsuit of one Demandant is the Nonsuit of both in this, any more than in other real Actions; but the Parcener who makes Default may be summoned and severed, and the other proceed to Judgment; and then of Course on the Partition made in this Adversary Way each Par-

V. Co. Litt.
139. a.

Parcener must have his Part assigned in Severalty; tho' on a Partition by Consent between three Coparceners, a third Part may be allotted to one in Severalty, and the others still continue to occupy the rest in common as before. *Litt. Sect. 276.* And it is the less unreasonable that the Part of him not proceeding should be divided with the rest in this Case, because he does not by the Severance absolutely cease to be Party to the Record, but notwithstanding, if he dies, the Writ shall abate. *10 Rep. 134.* in *Read and Redman's Case.* So if a Writ of Error be brought, not naming him who his summoned and severed, the Writ shall abate. *9 H. 6. 38. Bro. Error, 7.*

Lib. 2. c. 33.
P. 71.

The Manner of Partition among Parceners *ratione rei*, is much the same as among those at the Common Law, or *ratione personarum*; and therefore *Bracton* has treated of both indiscriminately in the same Chapter; if there be any Difference between them it is in the * Manner of dividing

* The Law concerning this Matter among Female Parceners is, that all Houses and Castles (except Castles for the necessary Defence of the Realm) ought to be parted among them, but these ought not to be divided. *1 Inst. 165.* And *Bracton, lib. 2. fol. 76.* And *Fleta, lib. 5. c. 9.* whom Lord Coke cites as his Authors, say, *si autem non nisi unicum sit Castrum, illud integrè remaneat Primogenito, ita tamen quod Postnato pro Parte sua satisfaciatur alibi ad valentiam.* And with this Restriction, that the eldest shall make Satisfaction, it seems are to be understood the Words of the Stat. *Hib. 14 H. 3. Cum Primogenita nihil plus petere possit quam alie sorores, nisi capitale Messuagium nomine Eineciæ.* And so is *Glanv. lib. 7. c. 3. Et vide Litt. Sect. 251.*

In Point of Descent and Partition.

iii

viding the Chief House or Capital Messuage; concerning which I find nothing in the later Books, but *Glanville*, *Bracton*, and *Fleta*, speaking of such Socage Lands as were partible in their Times, treat of this Matter almost in the same Words. ‘ Si vero fuerit

Chap. VI.
Of Partition
of the Capital
Messuage.

‘ Liber Socmannus tunc quidem dividetur
‘ Hæreditas inter omnes filios, &c. Salvo
‘ tamen Capitali Messuagio primogenito
‘ Filio pro dignitate Æsneziæ suæ, ita tamen
‘ quod in aliis rebus satisfaciat ad Valentiam. *Glanv. lib. 7. c. 3.* Et si unicum
‘ fuerit Messuagium, illud integre remaneat
‘ Primogenito, ita tamen quod alij habeant
‘ ad Valentiam de communi. *Bract. lib. 2. fol. 76. Fleta, l. 5. c. 9.* And the same
Authors had said a little before, ‘ Habet
‘ hoc Privilegium Primogenitus propter
‘ Æsnetiam, quod primam habebit Electionem, ut si plures participes sint ibi
‘ Cohæredes, & plura Capitalia Messuagia,
‘ primogenitus primò eligat, & postea Postnatus, & sic tertius, & quartus in infinitum,
‘ quamdiu superfuerit unicum Capitale Messuagium. Sed si complura ibi fuerint, non
‘ tamen tot, quod quilibet habeat unum,
‘ tunc illis, qui expertes sunt, de communi
‘ Hæreditate satisfiat ad Valentiam.

And if the House chosen by the Eldest, where there are many, is of greater Value than those which fall to the Share of the others, it seems he ought to make Satisfaction to his Brethren out of the rest of the Inheritance, or by a Rent out the House. *Vide Litt. Sect. 251.*

Indeed the Custumal of *Kent* sets up a different Kind of Partition; "Let the Messuage be parted among them; but let the Hearth for Fire (*Astre*) remain to the Youngest, and be the Value of it delivered to each of the Parceners of that Heritage, from forty Feet from that Hearth, if the Tenement will so permit, and then let the eldest have the first Choice, and the others after their Degree. So of Houses, which shall be found in his Hands, let them be divided among the Heirs by equal Portions, that is to say, by Feet, if it may be, saving the Covert of the Hearth, which shall remain to the Youngest, as is afore-said; so nevertheless that the Youngest make reasonable Composition with his Coparceners for the Part which belongs to them, by the Award of good Men."

But we learn from Mr. *Lambard*, ⁶²⁴/₃₆₃, that there is now no particular Regard paid either to the Eldest or youngest Son in making Partition, only Consideration is had that the Parts be equal and indifferent. Nor is it in the least strange that a Way of Division so inconvenient to all Parties should be disused.

Of Suit-Ser-
vice by Par-
ceners in Ga-
velkind.

Even after Partition of Gavelkind Lands, but one Suit shall be done for all the Parceners for such Tenements for which only one Suit was before due, but all the Parceners shall be Contributory, according to their several Portions, to him that does the Suit for them. *Custumal of Kent, infra. Stat. Marl. c. 9. Vide 2 Inst. 119.*

The

in Point of Descent and Partition.

113

The Entry into, and Seisin of any one Brother of Gavelkind Lands is the Entry and Seisin of all the Brothers Coparceners with him. 43 *Ed. 3. 19. a.* 1 *Lutw. 754.* Chap. VI. Where the Entry of one Parcener is the Seisin of all. But this must be understood of a general Entry, and not where one enters claiming the whole to himself. *Co. Litt. 243. b. 373 b.* 43 *Ed. 3. 19. a.*

But if there be three Coparceners in Gavelkind of a Reversion expectant on an Estate for Life, and one aliens his Part, tho' the Entry of the eldest Son may give Seisin to his Brother, yet it cannot to the Stranger; for he is in as Tenant in Common by a different Title, and must implead, and be impleaded by a several *Præcipe*; and it is a general Rule that where there shall be several Actions, there must be several Entries. Dyer 128.

It is but reasonable that the Sons partaking alike of the Advantages of the Inheritance should be equally subject to the Burthens attendant on it: And therefore if a Man seised in Fee of Lands in Gavelkind has Issue three Sons, and by Obligation binds himself and his Heirs, and dies, an Action of Debt is maintainable against all the Sons. *Co. Litt. 376. b. 386. b.* Of Debt against Heirs in Gavelkind on the Bond of their Ancestor. *Lamb. Peramb. 608. 142. Cro. Jac. 218.* And the Plaintiff in such joint Action shall declare on the Custom.* 11 *H. 7. 12.*

Q

But

* See the Form of the Declaration, *N. Bendl. 146. Raft. Ent. 208.* 1 *Brownl. Decl. 111.*

But then the Question will be, when the Obligee shall be compelled to bring his Action against all the Sons, or when he may sue the Heir at Common Law alone; which may be resolved by the following Distinctions.

If the Obligor dies seised of Land in Gavelkind only, the Writ ought of Necessity to be brought against them all: For all the Parceners make but one Heir.

And it has likewise been adjudged, * that if the Obligor leaves both Lands at Common Law, and Lands in Gavelkind, the Heir at Common Law shall not be charged alone, if the other Sons are seised at the Time of the Writ purchased; for the eldest Son is not chargeable simply as Heir, but because he has Lands by Descent as Heir, and this Reason serves equally to charge the rest; and in such Action not only his Assets at Common Law, but likewise his Part in Gavelkind would be liable, which that it should be severally from the rest is unreasonable. And therefore, if he be sued alone in such Case, on the special Matter disclosed by Plea, the Writ shall abate. 11 Ed. 3. *Dette* 7. *Hob.* 25.

But where there are Assets at Common Law, and likewise in Gavelkind, if the Obligee counts generally against the Sons as Heirs

* How the Obligee is to sue if the Obligor dies seised of Lands descended to him both from Father and Mother, see 11 H. 7. 12. *Co. Litt.* 376. 3 *Rep.* 14. a. Vide post. in App.

Heirs by the Custom, he shall have Execution only of the Lands in Gavelkind; the proper Way therefore to avoid all these Difficulties, is to declare in the same Count against *E.* as Heir by the Common Law; and against the same *E. C.* and *D.* as Heirs in Gavelkind, 11 *Ed. 3. Dette 7.* In the same Manner as the Heir at Common Law and Heir in *Borough English* are sued jointly in *Brownl. Ent. 180.* And this is agreeable to the Law in Case of Vouching the Heirs to Warranty, where there are Assets both at Common Law and in Gavelkind. *Vide post.*

If the eldest Son only has Assets remaining, and the rest have aliened their Parts, then the Obligee may bring his Action against the eldest alone. *Lamb. Peram. 615.* 11 *Ed. 3. Dette 7.*

But if pending a Writ against the Eldest Son only, Lands in Gavelkind descend to him and the others, the Writ shall abate. 11 *Ed. 3. Dette 7. Per Shard.*

If a Man having Lands in Gavelkind binds himself and his Heirs in an Obligation and dies, leaving three Sons, and one of them aliens his Part, and the Writ be brought against them all, the whole shall be levied upon the others who have Assets. As in Debt against two Female Parceners on the Bond of their Ancestor, if one of them has aliened before Action brought, the Plaintiff shall have Execution for his whole Demand against the Purparty of the other. 11 *Ed. 3. Dette 7.*

Book. I.

Debt against
3 Heirs in
Gavelkind,
who are out-
lawed, and 2
purchase Par-
don, the Parol
shall not de-
mur for the
Nonage of the
other.

Sir Anthony Aucher being seised in Fee of Gavelkind Lands, binds himself and his Heirs in an Obligation, and has Issue three Sons and dies; the Sons enter, the eldest of them has Issue a Daughter, and dies; and Debt is brought against the two surviving Brothers and the Issue of the Eldest (who was but seven Years old) as Heirs, and the Process continued till the Uncles were outlawed, and the Niece waived: The Uncles Purchase a Pardon for themselves, and on a *Scire Facias* to the Plaintiff *ad sequendum*, he declared against the Uncles *simul cum* the Niece; the two Defendants pleaded the Nonage of the Niece, and prayed Judgment whether they ought to answer during her Nonage: But the Court held, that the Parol ought not to demur, for that the Infant is out of Court, and by the Waivure the Original is determined against her; nor is the Outlawry void, but only voidable by Error. *Hawtrey and Aucher*, *Dyer* 239. *N. Bendl.* 146. *1 Amd.* 10. *Moor* 74. *Rast. Ent.* 208, 209.

By this Case it appears that a Parcener by Representation shall be charged with the Bond-Debt of the Ancestor, as well as the others, tho' *Moor* in his Report makes a *Quere* of it.

Of extending
the Lands of
the Heirs in
Gavelkind on
the Judgment
or Statute of
the Ancestor.

Having shewn in what Manner the Heirs in Gavelkind shall be charged by the Obligation of their Ancestor, let us suppose the Lands to descend to all the Sons charged with a Judgment suffered in Debt, &c. or a Statute acknowledged by their Ancestor, and them to make Partition; in this Case, if the
Part

Part of one of them alone be extended for the whole Debt, he may compel his Coparceners to contribute, as they are all *Æquali fure* : Chap. VI.
V. Stat. 16
& 17 Car. 2.
c. 5^a

As if a Man be seised of two Acres of Land, one of the Nature of *Borough-Englisch*, and binds himself in a Statute or Recognizance, or Judgment be given against him in Debt, and he dies, leaving two Sons, if one is charged alone, he shall have Contribution against the other. *3 Rep. 12. b. Sir W. Herbert's Case.*

So if a Man be bound in a Recognizance, and has two Daughters and dies, and they make Partition, one shall not be charged alone, but shall have Contribution : And if one be within Age, the other shall have the Benefit of it ; for in such Case, tho' she be charged as Ter-tenant, yet she shall have her Age. *3 Rep. 12 b. 13. a. Sir W. Herbert's Case.*

We have hitherto considered all the Sons as Heirs, but even with respect to Gavelkind Lands all the Sons as to some special Purposes shall not be accounted Heirs ; as in the Case of a Purchase, a Condition, or to take Advantage of a Warranty ; for the Heir to have the Benefit of these must not be Heir to a special Intent only, but the general and perfect Heir, the Heir at Common Law. To what Purposes all the Sons are not Heirs.

If Land in Gavelkind is granted or devised to *A.* for Life, Remainder to the Heirs, or Right Heirs of *J. S.* who has Issue four Sons, and dies, and afterwards the Tenant for Life dies ; the eldest Son of *J. S.* shall have the Land, Who shall be Heirs to take Gavelkind Lands by Purchase.

Book I.

Land, for he takes by Way of Remainder, and not by Descent, and he only to take by Purchase is the Right Heir by the Common Law. 37 H. 8. Bro. Done, 42. Nofme, 6. Discent, 59. 1 Rep. 101, 103. a. in Shelley's Case. Co. Litt. 10. a. Lamb. Peramb. 627. Hob. 31.

And the same is Law of *Borough English*, Hob. 31.

2 Vern. 732,
733.
Prec. in Chan.
464.

But if a Man has Lands of the Custom of *Borough English*, and likewise Lands at Common Law, and having two Sons, devises the latter to his Heir according to the Custom of *Borough English*, the Youngest Son shall take; and the Devise shall not be defeated because he is not Heir at Common Law, his elder Brother being living; since that was probably the Reason of making the Devise, as the Lands would have descended to him, had his Brother been dead. So if a Man having Gavelkind Land devises other Lands to his Heirs in Gavelkind, all his Sons shall take as sufficiently described by this Devise, tho' not Heirs by the Common Law. *Per Cowper Lord Chanc.* in delivering his Opinion in the Case of *Newcomen and Barkham*, 14 Feb. 1716.

And if a Man seised in Fee of Lands in Gavelkind makes a Gift in Tail, or Lease for Life to J. S. Remainder to his own Right Heirs, then it seems all his Sons shall take by the Name of Right Heirs; for the Remainder limited to the Right Heirs of the Donor is only a Reversion, he bearing in himself during his Life (in Judgment of Law)



Law) all his Heirs, and therefore the Heir shall have it by Descent. *Co. Litt. 22. b.* *Chap. VI.*
Dav. 31. a.

So if a Man seised of Lands in Gavelkind make a Feoffment to the Use of himself and his Wife in Tail, Remainder to his own Right Heirs, this Remainder shall go to the Heirs by the Custom. *26 H. 8. 4. b. Bro. Custom, 1. Lamb. 548.* For it is the old Use, and the Heirs take by Descent, their Ancestor having a precedent Estate of Freehold, and not by Purchase.

If a Man aliens Lands in Gavelkind on Condition, and dies, the eldest Son only shall enter for the Condition broken, and the Right of Entry does not descend to all the Sons. *Lamb. 608. 14. Noy's Max. 82. Dyer 343. b.* *Who is Heir to take Advantage of a Condition annexed to Gavelkind Lands.*

And the same Law is of a Condition annexed to *Borough English* Lands. *3 Rep. 21. Moor 114. Dyer 343. b.*

For the Heir to take Advantage of a Condition must be the Heir at Common Law, the compleat Heir. *9 H. 7. 25.*

It seems indeed, that when the eldest Son has entered into the whole for Breach of the Condition, and defeated the Estate of the Grantee, the Younger Sons may enter into their Part, and hold together with their Brother: In like Manner, as if a Man seised of Land on the Part of the Mother makes a Feoffment in Fee on Condition and dies, the Heir on the Part of the Father, who is Heir
at

Book I.

at Common Law, shall enter for the Condition broken, but the Heir on the Part of the Mother shall enter upon him and enjoy the Land. *Co. Litt. 12. b. Plow. 57. a.*

But we ought to distinguish between a Condition in Gross and a Condition incident to a Reversion; for of the latter the special Heir shall take Advantage, though not of the former. A Man made a Lease of Land, parcel *Borough English*, and parcel at Common Law, by Indenture for twenty one Years; *Provided* that if the Lessor, his Heirs, or Assigns should give a Year's Warning to the Lessee, that he, his Heirs, or Assigns would dwell there, then the Lease to be avoided; the Lessor died leaving two Sons, the eldest assigned over his Part to the Youngest; and the Question was, whether the youngest Son was such a Person as could give Warning, or whether the Condition was not gone by the Severance of the Reversion on the Death of the Father: *Manwood* and *Monson Justices* were of Opinion, that he might give Warning, and that the Law, which severed the Reversion, has severed the Condition also. And so for one Part as Heir in *Borough English*, and for the other as Assignee of his elder Brother (by the Stat. 32 H. 8. 34.) he shall take Advantage of the Condition. But if a Man makes a Feoffment in Fee of *Borough English* Lands on Condition and dies, having Issue two Sons, the eldest only shall take Advantage of the Condition, for it is a Condition in Gross; but in this Case there was a Reversion in the Lessor. *Moor 113. Godb. 2. S. C.*

And it is likewise laid down in *Co. Litt.* Chap. VI. 215. a. * that if a Lease for Years be made of two Acres, one of the Nature of *Borough English*, the other at Common Law, on Condition, and the Lessor dies, leaving Issue two Sons, each of them shall enter for the Condition broken, for by Act of Law a Condition may be apportioned. And the same Thing is agreed in *Dumpr's Case*, 4 *Rep.* 120. b. and in 1 *Roll's Rep.* 331. Ante 85, 86.

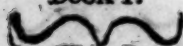
Manwood in *Dyer* 316. b. puts this Case, When Words A Man seised in Fee of Land in Gavelkind, of Condition has Issue two Sons, and by his last Will in a Will of devises the Land to his eldest Son, on Con- Gavelkind dition that he pay to the Wife of the Devi- Lands shall be construed for 100 l. at a certain Day, and he fails of a Limitation. Payment, whether the younger Son may enter on a Moiety upon his Brother, by a Limitation implied in the Estate? *Quære* :

But this Doubt is, as *Lord Coke* observes, well resolved by the following Determination :

R

A Co-

* It is difficult to reconcile with this, another Passage in the same Book : That if a Man seised of Lands *ex parte matris*, makes a Gift in Tail or Lease for Life, the Heir of the Part of the Mother shall have the Reversion ; and the Rent also, as incident thereunto, shall pass with it ; but the Heir of the Part of the Mother shall not take Advantage of a Condition annexed to the same ; because it is not incident to the Reversion, nor can pass therewith. *Co. Litt.* 12. b. But as this is not warranted by the Case cited as an Authority for it in the Margin of that Book, I have adhered to the other Opinions as more agreeable to common Reason.



A Copyholder in Fee of Land descendible in *Borough English*, having three Sons and a Daughter, after a Surrender to the Use of his Will, devises the Land to his *eldest* Son, paying to his Daughter and each of his other Sons 40 s. within two Years after his Death; the eldest Son is admitted, and does not pay the Money; the youngest Son enters on the Land, and his Entry was held lawful; for tho' the Word *Paying* in Case of a Will may make a Condition, yet here the Law construes it a Limitation, of which the youngest Son in *Borough English* may take Advantage; and it is the same as if he had devised the Land to his eldest Son till he made Default in Payment: For if it should have been a Condition, then it would have descended to the Eldest, and it would consequently have been at his Pleasure, whether his Brothers or Sister should be paid or not. *Wellocke and Hammond*, 3 Rep. 20, 21, *Cro. Eliz.* 204. 2 *Leon.* 114.

But let us put a Case a little different from the former: A Man having three Sons devises Gavelkind Lands to his *second* Son, paying, or upon Condition to pay, to each of his other Sons 100 l. and the Devisee fails of Payment, I take it that the youngest Son cannot take Advantage of this by entering into a third Part; but in order to defeat the Devise the Eldest Son ought first to enter upon the Whole, agreeably to the Determination in the Case of *Curtis and Woolverstone*, *Cro. Jac.* 56. Where a Man having three Sons, and several Daughters, devised Lands descendible in *Borough English*

Gift to his second Son in Fee, on Condition to pay 20 l. to each of his Daughters at their Age of twenty-one; the Devisee not paying the Money at the Time, the youngest Son entered in his own Name; but it was held ill, for this shall not be taken as a Limitation, but as a Condition, it differing from the Reason of the Case of *Wellocke* and *Hammond*, where had it been construed a Condition, it had been void and to no Purpose; but it shall be expounded according to the Common Law, where it is not necessary to give it a contrary Exposition.

Chap. VI.

Concerning Warranties annexed to Gavelkind Lands, it is said generally in several Books, that every Warranty which descends, descends to him that is Heir by the Common Law. *Co. Litt.* 12. a. 376. a. *Litt. Sect.* 603, 718. *Hob.* 31. *Cr. Jac.* 218. 22 *Ed.* 4. 10. b. But for the better understanding this Rule with the proper Restrictions, I will consider the Authorities which treat more distinctly of this Matter, under three Heads; first, whether the younger Sons, Heirs in Gavelkind, may take Advantage of a Warranty annexed to their Estate: 2. Whether they shall be barred or rebutted by the Warranty of their Ancestor. 3. Whether they may be vouched by Reason of such Warranty.

Of Warranties of Gavelkind Lands.

1. If Land warranted comes to a younger Brother by *Borough-English* or Gavelkind, he is without Remedy against the Warrantor; for he cannot vouch as Heir

1. Whether Younger Sons, Heirs in Gavelkind, can take Advantage of a Warranty.

Book I. alone, except when he comes in as a Vou-
chee for his Possession with the very Heir,
Hob. 25. W. Jones 361.

2. Whether
they shall be
barred by a
Warranty.

W. Jones
361.

Fitzh. Gar-
ranty, 94.

Litt. Sect.
603.

But 2dly, as the Heirs in Gavelkind cannot take Advantage of a Warranty, so on the other Hand they shall not be barred by it. *17 Ed. 3. 61. 44 Ed. 3. 16. b. 22 Ed. 4. 10. Noy's Max. 84.* For Warranty on Land in *Borough English* or Gavelkind binds only the Heir at Common Law. *Dyer 343. b.*

Litt. Sect. 735. " A Warranty cannot
" go according to the Nature of the Tene-
" ments by the Custom, but only accord-
" ing to the Form of the Common Law :
" For if Tenant in Tail be seised of Te-
" nements in *Borough English*, where the
" Custom is that all the Tenements with-
" in the same Borough ought to descend to
" the youngest Son, and he discontinues
" the Tail with Warranty, &c. and has
" Issue two Sons, and dies seised of other
" Lands and Tenements in the same Bo-
" rough in Fee-simple to the Value or
" more of the Lands entailed, &c. yet the
" youngest Son shall have a *Formedon* of
" the Lands entailed, and shall not be
" barred by the Warranty of his Father,
" though Affets descended to him in Fee-
" simple from his said Father according
" to the Custom; for that the Warran-
" ty descends on his elder Brother, who
" is in full Life, and not on the Youn-
" gest: And in the same Manner it is of a
" * col-

in Point of Descent and Partition.

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“ * collateral Warranty made of such Te- Chap. VI.
“ nements, where the Warranty descends
“ on the eldest Son, &c. this shall not bar
“ the youngest Son, &c.

Sec. 736. “ In the same Manner it is
“ of Tenements in the County of *Kent*
“ which are called Gavelkind, which Tene-
“ ments are partible among the Brothers,
“ &c. according to the Custom; if any
“ such Warranty be made by an Ancestor,
“ such Warranty shall descend only to the
“ Heir, which is the Heir at Common Law,
“ that is to say, to the elder Brother, ac-
“ cording to the Consuance of the Common
“ Law, and not to all the Heirs, that are
“ Heirs of such Tenements according to
“ the Custom.”

Lord Coke's Comment on this Place is
this, “ Hereupon a Diversity is to be ob-
“ served between a Lien Real and a Lien
“ Personal.

* It is a common Mistake, that all collateral War-
ranties are taken away by the Stat. 4 & 5 Ann. 16.
whereas that Statute only makes void all Warranties by
Tenant for Life, and all collateral Warranties made
by any Ancestor, *not having an Estate of Inheritance*
in Possession: So that if *A.* be Tenant in Tail, Re-
mainder to *B.* his next Brother (which is a very common
Case, arising almost on every Marriage-Settlement)
and *A.* being in Possession makes a Feoffment, or le-
vies a Fine, with Warranty from him and his
Heirs, and dies without Issue; this is a † collateral
Warranty, (for *B.*'s Title is by Way of Remainder, † *Vide Litt.*
to which his elder Brother is collateral) which shall *sec. 716.*
bar *B.* notwithstanding the Statute, tho' no Assets de-
scend. *Et sic de similibus.*

Book I.

“ Personal. For the Lien Real, as the
 “ Warranty, doth ever descend to the Heir
 “ at the Common Law, but the Lien Per-
 “ sonal doth bind the special Heirs, as
 “ Heirs in Gavelkind, &c.” And the ve-
 ry same Observation is made by the same
 Judge, *Cro. Jac.* 218.

But the Warranty may be pleaded in Bar
 of the Purparty of the eldest Son, tho’ not
 of the Younger. 17 *Ed.* 3. 61. *a.* 44 *Ed.* 3.
 16. *b.*

Indeed, by the Pleading in *Beare’s Case*,
Goldsb. 88. 1 *Leon.* 112. It seems admit-
 ted, that a Warranty with Affets will bar
 all the Heirs in Gavelkind, but as it is con-
 trary to all the other Authorities, it can-

Devise of Ga-
 velkind Lands
 to all the Sons
 equally to be
 divided, they
 shall be in by
 the Devise,
 and not by
 Descent.

not be maintained as Law: But the Case is
 worthy to be cited for the Matter adjudged:
 A *Formedon* in *Descender* by three Brethren
 of Lands in Gavelkind; the Warranty of
 their Ancestor was pleaded against *them* in
 Bar, and they were at Issue upon Affets de-
 scended to the Demandants: The Jury
 found a special Verdict; that the Father of
 the Demandants was seised of the Lands al-
 leged to be Affets, and by his Will devi-
 sed them to his three Sons, the now De-
 mandants, and to their Heirs equally to be
 divided; and if this should be said to be a
 Descent to them was the Question, because
 the Law would have done as much, and
 therefore they should be Affets: But the
 Court held the contrary, for they shall be
 Jointenants or Tenants in Common, and
 they shall not be in by Descent, and so no Af-
 fets; for if a Man may have more Benefit by
 the

In Point of Descent and Partition.

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the Devise than by Descent, he shall take by the Devise. The same Law if he devises his Lands to his two Daughters and their Heirs, they shall be Jointenants and not Coparceners; and if a Man devises to his Son and Heir in Tail, he shall not take by the Descent. *Cro. Eliz.* 431. *Goldf.* 141.

3. If a Man infeoff another of an Acre of Land with Warranty, and has Issue two Sons, and dies seised of another Acre of Ground of the Nature of *Borough English*, and the Feoffee is impleaded, tho' the Warranty descends on the eldest Son, yet he may vouch them both, the one as Heir to the Warranty, and the other as Heir to the Land; for if he should vouch the eldest Son only, then he should not have the Fruit of his Warranty, viz. a Recovery in Value; and the youngest Son only he cannot vouch, because he is not Heir at the Common Law upon whom the Warranty descends. *Co. Lit.* 376. a.

3. Of vouching Heirs in Gavelkind or Borough English.

1 Ed. 3. 12.
40 Ed. 3. 14.
22 Ed. 4. 10.

* So it is of Heirs in Gavelkind, the eldest may be vouched as Heir to the Warranty, and the other Sons in Respect of the Inheritance descended to them. But the Heir at Common Law may be vouched alone at the Election of the Tenant. *Co. Lit.* 376. b. *Hob.* 25. 2 *Roll. Abr.* 748. pl. 3.

* 19 Ed. 2. Aid 172.
1 Ed. 3. 12. a.
4 Ed. 3. 55.
43 E. 3. 19.
25 E. 3. 38.
Fitz. Counterplea del Voucher 80.

Voucher 2, 66, 94, 313, 314. 27 H. 6. 1. 22 Ed. 4. 10. a. in Respect of the Possession.

If he has likewise Assets at Common Law; for otherwise they must all be vouched of Necessity, unless the younger Son has aliened

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aliened his Purparty before the Day of Voucher. 38 *Ed.* 3. 22. *b.* And the eldest Son cannot be vouched alone where the other Brothers have Part of the same Inheritance. 11 *Ed.* 3. *Dette* 7. *Noy's Max.* 84.

Where Lands at Common Law descend, and likewise in Gavelkind, and there are divers Sons, and the Feoffee would have the Affets of each Kind liable to his Warranty, *A.* the eldest Son must first be vouched by himself as Son and Heir of the Warrantor; and then the same *A.* with his other Brothers, Sons and Coheirs of the same Ancestor, all in one Voucher; for the Tenements at Common Law will not be recovered in Value, unless the Eldest be first vouched alone, and then with the others. 11 *Ed.* 3. *Dette* 7. 4 *Ed.* 3. 55. *b.* and in 33 *Ed.* 3. *Judgment*, 254. is a Voucher in like Manner.

But as Vouching two Men as Heirs to the same Ancestor appears to be against the Common Law, which acknowledges but one Heir Male, it cannot be done without shewing the Custom at the same Time. 16 *H.* 7. 13. *a.* Nor is it sufficient to say, that the Land in Demand is Gavelkind, but it must also be alledged, that they are *seised* of this Gavelkind Land by Descent; for if the eldest Son enters into the whole claiming it to himself, so that his Entry cannot be said to be the Possession of the other, the Youngest cannot be vouched with the Eldest, because he has not the Possession, in regard of which only he is to be vouched. 43 *Ed.* 3. 19. *a.* 2 *Roll. Abr.* 748. *pl.* 2 *§* 4.
If

If the Father enfeoff his Son and Heir, with Warranty from himself and his Heirs, and dies, the Son shall vouch himself, and his younger Brother as Heir in *Borough English*, but then this Cause must be specially shewn. 40 *Ed. 3. 14. a.* 41 *Ed. 3. 25. a.* *Co. Litt. 390. a.* 2 *Roll. Abr. 746. pl. 17.*

So if after such a Feoffment the Father die seised of Lands in Gavelkind, the eldest Son may vouch himself and his Brother by the Custom of Gavelkind, shewing this for Cause. 12 *H. 7. 3. b.* 12 *Ed. 3. Voucher 113.*

In the Case of *Borough English*, the Son and Heir by the Common Law having nothing by Descent, the whole Loss of the Recovery in Value lies upon the Heirs of the Land, tho' they be no Heirs to the Warranty. Then put the Case that there is a Warranty paramount, who shall deraign that Warranty, and to whom shall the Recovery in Value go? Some have said that as they are vouched together, so shall they vouch over, and that the Recompence in Value shall enure according to the Loss, and that the Effect must pursue the Cause, as a Recovery in Value on the Part of the Mother shall go to the Heirs on the Part of the Mother, &c.

Some others hold that it is against the Maxim in Law, that they, that are not Heirs to the Warranty, should join in Voucher, or take Benefit of the Warranty which descended not to them; but that the Heir at the Common Law, to whom the War-

Book. I. Warranty descended, shall deraign the Warranty and recover in Value, and that this doth stand with the Rule of the Common Law.

Fitzh. Gar-
rantie, 94.

Others hold the contrary, and that it should be both against the Rule of Law and against Reason also; for by the Rule of Law the Vouchee shall never sue to have Execution in Value, till Execution be sued against him: But in this Case Execution can never be sued against the Heir at Common Law; therefore he cannot sue to have Execution over in Value. 2dly, It should be against Reason, that the Heir at Common Law should have *totum Lucrum*, and the special Heirs *totum Damnum*. I find in our Books this Reason yielded, that the special Heir should not be vouched only, because if the special Heirs should be vouched only, they should not deraign the Warranty over, which should be mischievous that they should lose the Benefit of the Warranty; but if the Heir at Common Law were vouched with them, as by Law he ought, all might be saved. *Co. Litt. 376. b.*

And this latter appears to be the Opinion of Lord Coke himself, from the Case of *Game and Sims*, *Cro. Jac.* 218. where the same Judge says, that if the Heir at Common Law be vouched for Warranty, who vouches the Heirs in Gavelkind because of the Possession, they all shall vouch over, and what is recovered in Value shall go only to the Heirs in Gavelkind: So if two be vouched where one has nothing, and they vouch over, the Recovery in Value goes only to him who had the Interest.

And of the same Opinion both as to the Heirs in Gavelkind and *Borough English* was *Holt Ch. Just.* in the Case of *Page* and *Heyward*, *Trin. 3 Ann.*

If two Coparceners in Gavelkind are Age in Voucher. vouched as one Heir, the Parol shall demur for the Nonage of the Youngest, if he be seised; yet he is vouched for his Possession, and not because of the Descent of the Warranty. *43 Ed. 3. 19. a. 1 Roll's Abr. 144. pl. 1. 27 H. 6. 1.*

But it is a good Counterplea in such Case, that the youngest Son is seised of no Part of the Land by Descent from the same Ancestor, and therefore that the Demandant ought not to be delayed by Reason of his Nonage. *43 Ed. 3. 19. a. Bro. Counterplea del Voucher, 11.*

If one Parcener in Gavelkind is vouched, Aid Prayer he may pray in Aid of his Coparceners, that in Voucher. they may be equally charged, and have the Benefit of the Warranty Paramount. *11 H. 4. 23. a.* But where in a *Cui in vita* four Coparceners in Gavelkind were vouched, and three of them made Default after Default, upon which Seisin of the Land was awarded for three Parts, and the fourth entered into the Warranty; it was adjudged that he should not have Aid of the other three; for the Charge is now equal, and the others have lost their Parts, and if he should have Aid of them, he should recover also *pro rata* against them for his Part, and so

Book I.

should not lose as much as the rest, but only a Fourth Part of the Fourth Part. 19 *Ed. 2. Fitzb. Aide, 172. 1 Roll's Abr. 182. pl. 14. 185. pl. 8.*

Warranty in a Fine for the Heirs of three, the Lands being Gavelkind, good.

Three Men levied a Fine with Warranty for the Heirs of them all; the Court doubted whether they should receive it, for that the Warranty should be for the Heirs of one in certain; but because the Land was Gavelkind, and the Conusors Heirs by the Custom, it was admitted. 24 *Ed. 3. 66. b. Fitzb. Fines, 113. Bro. Fines, 65. Co. of Fines, Sect. 3.*

Of the Partition of Goods in Kent.

The Statute (as it is called) *de Consuetudinibus Kancie* makes mention of a customary Partition of the personal Estate of the Gavelkind Tenant at his Death, amongst his Wife and Children, much in the same Manner as is the Custom of London: But this was at a Time when, by the better Opinions, the Writ *De Rationabili parte Bonorum* was holden to lie by the general Custom of the Realm. *Glanv. lib. 7. c. 5. Magna Charta, c. 18. Braet. lib. 2. c. 26. f. 60. b. & seq. Fleta 125. 17 Ed. 3. 9. a. 30 Ed. 3. 25. 31 Ed. 3. Responder, 6. And Lord Coke's Co. Litt. 176. b. Opinion in 2 Inst. 33. that this Writ never lay by the Common Law, is founded on an apparent Mistake of the Passage in Braet. Neq; uxorem neq; liberos amplius capere de bonis defuncti patris vel viri mobilibus, quam fuerit eis specialiter relictum, &c. which in the Book itself is affirmed of the Custom of some Cities and Boroughs, in Opposition to the*

the general Law of the Land. However it is certain there is no such Custom in the County of *Kent* at this Day; Mr. *Lambard*, Chap. VI. *Peramb.* $\frac{4}{5}$ $\frac{1}{10}$.. who wrote above 150 Years ago, speaks of it only as a Thing which had been formerly; and tho' Mr. *Sommer* mentions an Inclination in some Persons of his Time to have revived this Usage, yet their Endeavours never took Effect: On the contrary, the Men of *Kent* have now beyond Controversy the same Power of disposing of their personal Estates by Will, as the other Subjects of this Kingdom; and as to the Division of Intestate's Estates are equally under the Direction of the Statutes of Distribution: And therefore I shall pass over this Partition of Goods as an obsolete Matter. In Pref. to Gavelkind.

BOOK II.

Of the special Customs incident to Gavelkind Lands in Kent.

CHAP. I.

Of Tenancy by the Curtesy.

I NOW come to treat of the *special* or *particular* Customs: which the Courts of Law will not take Notice of barely on alledging the Lands to be of the Nature or Tenure of Gavelkind, but *Ante 41, 42.* which ought to be pleaded as specially as other Customs; such as, according to the Opinion of the Court in the Case of *Wiseman* and *Cotton*, are not properly incident to, or inseparable from the Nature of Gavelkind, and yet are by immemorial Usage annexed to Land of this Tenure in the County of *Kent* equally with Partition, and indeed at this Day are more extensive than that, these still continuing to take place (as has been before observed) even in Lands disgavelled. *Ante 77.*

I shall

Of Tenancy by the Curtesy.

Book II.

I shall first begin with the Tenancy by the Curtesy of the Wife's Inheritance in Gavelkind.

How this Custom differs from the Curtesy of *England*.

† Post Itin. Kanc. 39 H. 3. rot. 14. in dorso, rot. 26. in dorso. 9 Ed. 3. 38. a. Somn. 179.

This was formerly called the Man's † *Free-Bench*; and differs from the Husband's Estate by the Curtesy of *England*, both in Quantity, it being but of a Moiety; and in Quality, as it is obtained on more easy Terms, for Children are not necessary to intitle to it; and indeed enjoyed upon different Conditions, it being liable to be forfeited by the Marriage of the Tenant.

But as I have heard some Doubt made whether there be any Usage in this County variant from the Common Law concerning Tenancy by the Curtesy, I shall not content my self with this short Account of the Peculiarities of this Custom, but think it necessary to cite in a more particular Manner what Authorities I have found on Record or in the Books in Support thereof, that no Room may be left for future Disputes concerning it.

Authorities to shew that the Husband is intitled, after Issue had, only to a Moiety as long as unmarried.

I shall therefore endeavour to shew, 1. That the Husband surviving the Wife is, even after Issue had between them, by the Custom of *Kent* intitled to no more than a Moiety of her Gavelkind Lands, and that only while he lives unmarried.

2. That the Custom gives him the same Advantage, tho' he never had Issue by his Wife.

The first is generally accounted the more doubtful Point; but I chuse to begin with it, because it will appear to be put most beyond Controversy by the Evidence on Record as to this Matter; which is very strong, and in order of Time as follows: *Itin.*

Itin. Kanc. 39 H. 3. Rot. 14. in dorso. A Chap. I.
Cui in vitâ by John le Mose & Juliana
 his Wife against *John Peltebeam*, for a *Cui in vitâ.*
 Messuage and Lands in *Malling*: ‘ Et Jo- Tenant pleads
 ‘ *bannes Peltebeam* venit, & de medietate that he is sei-
 ‘ prædictorum tenementorum dicit quod ipse sed but of a
 ‘ non potest respondere, quia dicit quod non Moiety,
 ‘ tenet prædictam terram nisi in Custodiâ and of that
 ‘ cum quodam *Philippo* filio suo, cujus Jus & as his Free-
 ‘ Hæreditas prædicta terra est, & qui est Bench by the
 ‘ infra ætatem & in custodiâ suâ, & de al- Custom of
 ‘ terâ medietate dicit, quod *tenet medietatem Kent*, being
 ‘ *illam tanquam liberum Bancum suum per Le- the Inheri-*
 ‘ *gem & Consuetudinem Kancie*, eò quod præ- tance of his
 ‘ dictum tenementum fuit Jus & Hæreditas late Wife.
 ‘ cujusdam *Rosamundæ* quondam uxoris suæ;
 ‘ & vocat inde ad warrantum prædictum And prays in
 ‘ *Philippum* filium & hæredem prædictæ *Ros-* Aid of his Son,
 ‘ *samundæ*, qui est infra ætatem: Ideo lo- his Wife’s
 ‘ quela ista, quantum ad medietatem præ- Heir, &c.
 ‘ dictam, quam ipse tenet in liberum Bancum
 ‘ suum sine die, usq; ad ætatem prædicti *Phi-*
 ‘ *lippi*; & de aliâ medietate prædicta Con-
 ‘ sideratum est quod prædictus *Jobannes*
 ‘ *Peltebeam* inde sine die, & *Jobannes* & *Ju-*
 ‘ *liana* in mi’a pro falso clamore.’

Itin. Kanc. 55 Hen. 3. Rot. 7. ‘ Assisa ve- Assise,
 ‘ nit recognitura si *Simeon de Haliberg* & Tenants plead
 ‘ *Beatrix* Uxor ejus, &c. injuste disseisive- that the Plain-
 ‘ runt *Willum* filium *Jobannis de Hersing* tiff was inti-
 ‘ de libero tenemento, &c. Et *Simeon* & Tenant by the
 ‘ *Beatrix* uxor ejus dicunt, quod prædictus Curtesy, and
 ‘ *Willus* injuste tulit Assisam illam contra that he for-
 ‘ eos, quia dicunt quod prædictum tene- seited his E-
 ‘ mentum, quod prædictus *Willus* posuit state by mar-
 ‘ in visu suo, fuit jus & hæreditas cujusdam being Gavel-
 ‘ *Christianæ* kind, &c.

Christiane quondam uxoris suæ, & sororis
 prædictæ *Beatricis*, cujus hæres ipsa est;
 ita quod idem *Willus* vivente prædictâ
Christianâ uxore suâ tenuit prædictum te-
 nementum in manu suâ, & postea mor-
 tuâ eâdem *Christianâ* tenuit idem *Willus*
 prædictum tenementum † *per legem An-*
glie, sicut ei licuit, quamdiu se tenuit sine
uxore sibi desponsata; & quia idem *Willus*
 postea desponsavit quendam uxorem, idem
Simeon & Beatrix, eò quod proles suscepta
 de prædictis *Will'o & Cristianâ* obiit, posu-
 erunt se in prædicto tenemento nomine ip-
 sius *Beatricis* propinquioris hæredis præ-
 dictæ *Cristiane*, sicut eis licuit *secundum Le-*
gem

† The Reader may observe, that several of these
 Records take no Notice that the Quantity of the Hus-
 band's Estate by the Custom is different from that
 by the Curtesy of *England*; but it will occur at
 the same Time that the Question in them was not
 what Part the Tenant was intitled to at the Death of
 his Wife, but only whether he had by a subsequent
 Act forfeited that Estate, whatsoever it was; and the
 Conclusion of them all is that the Tenant had lost his
 Estate, so that it became entirely immaterial what he
 had before. The Reasons of the Husband's not de-
 manding a *Moiety* only of so many Acres, &c. are, 1.
 Because he might remain in the whole *quousq; partitum*
fuit, &c. as appears by the Record of *Itin. Kanc. 21*
Ed. 1. rot. 1. where on this Account, tho' his Claim
 is but of a *Moiety*, he has Judgment for the whole.
 2. If the Action was brought after Partition made,
 then he no longer remained Tenant of an undivided
Moiety, but of Course counted for the whole of so
 many Acres, as were allotted to him on the Parti-
 tion; as we see in *Itin. Kanc. 6 Ed. 2. rot. 17.* The
 rest of the Records put it out of all Doubt that he
 is but intitled to a *Moiety*.

gem & Consuetudinem Tenementorum in Gavelykinde.

Et prædictus Willus bene concedit quod ipse nihil clamat nisi nomine prædictæ Christianæ, sed dicit quod prædictum tenementum non est talis naturæ, quod illi, qui illud tenent per legem Angliæ, illud amittere debeant, licet ad secundas nuptias convolaverunt; & de hoc se ponit super Assisam. Postea prædictus Willus non est profecutus breve suum, &c.

Plaintiff replies, that the Lands are not of such Nature.

In eod. Itin. Rot. 51. Assisa venit recognitura si Mabilia filia Dyonisæ & alii injuste disseisiverunt Johannem le Gule de libero tenemento suo, &c.

Non suit.

Et Mabilia & alii venerunt, & Mabilia respondet pro se & omnibus aliis, & dicit quod prædictum Messuagium & terræ fuerunt perquisitum prædictæ Dyonisæ matris suæ, quæ nupta fuit prædicto Johanni le Gule, ita quod post mortem ejusdem Dyonisæ prædictus Johannes tenuit prædicta tenementa per legem Gavelykynd, & quia fecit vasum & estrapamentum de eodem tenemento postquam aliam uxorem duxerat, prædicta Mabilia intravit in prædicta tenementa per capitalem Dominum ejusdem feodi, ut in hæreditatem suam, prout ei bene licuit secundum Legem & Consuetudinem Gavelykindorum.

Assise,

Tenant pleads, that the Plaintiff being seised as Tenant by the Curtesy married again and committed Waste, and that she entered, &c. by the Custom of Gavelykind.

Et prædictus Johannes dicit quod nihil habuit in prædictis tenementis nomine prædictæ Dyonisæ, quia dicit quod tenementa fuerunt perquisitum suum, &c.

Plaintiff replies, that the Lands are of his own Purchase.

Juratores dicunt super sacramentum suum quod prædictum tenementum fuit jus prædictæ

Verdict, and Judgment for the Tenant.

Book II.

dictæ *Dionisie* uxoris prædicti *Johannis*,
 qui tenementum illud postea tenuit per Legem
 Angliæ, & quia idem *Johannes* secundò
 maritavit, & fecit vastum & venditionem de
 prædictis tenementis, prædicta *Mabilia* in-
 travit in prædicta tenementa, secundum quod
 ei licuit per Legem *Kancie*. Ideo confi-
 deratum est quod prædicta *Mabilia* & alii
 eant inde sine die, & prædictus *Johannes*
 nihil capiat per *Affisam*, sed sit in mi'a,
 &c.

Affise,

Itin. Kanc. 7 Ed. 1. Rot. 3. in dorso, Rex
Roll. In an Affise brought by *William* and
Thomas Sons of *Hugh de Hormesdesboll* against
Stephen Arnet, for a Messuage and two Acres
 of Meadow in *Westbyr*, the Tenant pleads,
 that the Premisses in Question ' fuerunt Jus
 & Hæreditas *Juliane* quondam uxoris suæ,
 &c. quæ inde obiit seiscita, de quâ ipse su-
 scitavit prolem, unde dicit quod nihil cla-
 mat in prædictis tenementis nisi per le-
 gem *Angliæ* ratione prædictæ prolis ex eâ
 suscitata, &c.

Tenant
 pleads, that
 he is in by the
 Curtesy of
 England.

Plaintiffs re-
 ply the Cu-
 stom of Ga-
 velkind, to
 forfeit by se-
 cond Mar-
 riage, &c.

' Et iidem *Willus* & *Thomas* dicunt, quod
 prædictus *Stephanus* nihil clamare potest in
 tenementis prædictis per legem *Angliæ*,
 quia dicunt quod prædictum tenementum
 tenetur in *Gavilekynde*, & *Consuetudo* de
Gavilekynde talis est quod cum aliquis despon-
 savit mulierem habentem hæreditatem, & ex
 eâ suscitavit prolem, & post mortem illius mu-
 lieris aliam duxerit in uxorem, hæredes primæ
 mulieris habent actionem petendi hæreditatem
 primæ uxoris; & dicunt quod prædictus
Stephanus post mortem prædictæ *Juliane*
 primæ uxoris suæ, matris prædictorum
 Will;

‘ *Willi & Thomæ*, duxit quandam uxorem
 ‘ quæ adhuc superstes est. Postea venit *Ju-*
 ‘ *rata & dicit quòd talis est Consuetudo Patriæ* Chap. I.
 ‘ qualis prædicti *Willus & Thomas* dicunt, Verdict finds
 ‘ & quòd prædictus *Stephanus* quandam a- the Custom,
 ‘ liam in uxorem duxit, quæ adhuc superstes
 ‘ est. Ideo consideratum est quòd prædictus Judgment for
 ‘ *Willus & Thomas* reciperent seisinam su- the Plaintiffs,
 ‘ am, &c.’

Itin. Kanc. 21 Ed. 1. Berewicke Roll, Rot. 1. Affise,
in dorso. In an Affise brought by *William*
Stoc against *Robert* Son of *Robert de Thirling*,
 for Lands in *Sturrey* and *Westbere*, the Te-
 nant pleads in Bar, that he is Son and
 Heir of *Maud* of *Westbere*, who died seised
 of the Premisses in Question. The Plain- Plaintiff inti-
 tiff in his Replication admits that *Maud* died tles. himself to
 seised, ‘ sed dicit quòd ipse desponsavit præ- a Moiety as
 ‘ dictam *Matildam*, de quâ suscitavit prolem, Tenant by
 ‘ ratione cujus prolis ipse habere debet me- the Curtesy
 ‘ *dietatem* totius tenementi de quo ipsa *Ma-* according to
 ‘ *tilda* obiit seisata, per Consuetudinem *Kan-* the Custom of
 ‘ *ciæ*, eò quod tenementa prædicta tenentur Gavelkind.
 ‘ in *Gavilykende*, & in eodem morari de-
 ‘ bet quousq; partitum fuerit inter ipsum
 ‘ & hæredem.’

The Tenant rejoins, and confesses that
 the Plaintiff had Issue by *Maud*, ‘ sed dicit
 ‘ quòd *Willus* eà ratione de tenementis
 ‘ quæ tenentur in *Gavylekende* secundum
 ‘ Consuetudinem *Kancie* nihil habere debet ;
 ‘ & hoc paratus est verificare.’

‘ Et quia † *TOTUS COMITATUS* The whole
 ‘ *reçordatur quòd quilibet vir qui desponsaverit* County find
 ‘ *mulierem, quæ tenementa habet de hæreditate* the Custom.

† For the
 ‘ *suâ* Meaning of
 this Expression, see *post lib. 2. c. 7.*

Of Tenancy by the Curtesy.

Book II.

‘*suâ, & de ipsâ prolem suscitaverit, post mortem ejusdem uxoris habere debet medietatem totius hereditatis ejusdem tenendam ad terminum vitæ suæ, nisi prius aliam duxerit uxorem, Ideò consideratum est quòd prædictus Will’us recuperet seisinam suam de prædictis tenementis.*’

Assise,

Tenant pleads Non-tenure, for that he had been Tenant by the Curtesy, but had forfeited by the Custom of Gavelkind, by marrying again.

In eod. Itin. Rot. 41. An Assise brought against Salomon Son of Hugh de Attefeld, who pleads Non-tenure in the following special Manner: ‘ Venit & dicit, quòd prædictum tenementum fuit de Gavelecund, & quòd quædam Cristiana quondam uxor sua obiit inde seifita ut de feodo, post cujus mortem prædictus Salomon tenuit tenementa prædicta per legem Angliæ quousque secundam uxorem desponsaverat, per quod incontinenti per Consuetudinem de Gavelecund forisfecit ipse tenementa prædicta; & liberum tenementum eorundem tenementorum fuit quarundam Johanne & Margerie filiarum ipsorum Salomon & prædictæ Cristiane, & quòd Cristiane prædictæ Johanna & Margerie hæredes sunt; unde dicit quòd ipse non tenet.’ And Issue is taken on the Non-tenure.

The Jury find accordingly.

‘*Juratores dicunt super sacramentum suum quòd prædicta Cristiana obiit seifita de tenementis prædictis ut de feodo, post cujus mortem prædictus Salomon tenuit tenementa prædicta per Legem Angliæ quousque secundam uxorem suam desponsaverat, per quod incontinenti postea liberum tenementum prædictum tenementum fuit prædictæ Johanne & Margerie, ut hæredum prædictæ*

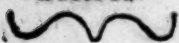
Chap. I.

In Affise the Jury find that the Tenant by the Curtesy of Gavelkind shall have but a Moiety by the Custom.

Affide.

Tenant pleads
that the Plain-
tiff was never
seised, &c.

Book II.



nunquam fuit in seisinâ de prædictis tenementis cum pertinentiis ut de libero tenemento suo, ita quòd potuit disseisiri, & de hoc se ponit super patriam, & prædictus *Petrus* similiter, Ideo capiatur Affisa;

Jury find

Juratores dicunt super sacramentum suum quòd prædicta tenementa, quæ prædictus *Petrus* posuit in visu suo, & unde queritur se disseisiri, tenentur in Gavelykynde, & sunt medietas unius Messuagii, viginti acrarum terræ, & sexdecim solidatorum redditus cum pertinentiis, quæ aliquo tempore fuerunt in seisinâ prædicti *Petri* & cujusdam *Agnētis* quondam uxoris ipsius *Petri*, ut de Jure & Hæreditate ipsius *Agnētis*. Qui quidem *Petrus* procreavit de ipsâ *Agnete* duos filios, scil. prædictum *Willum* filium *Petri*, & quendam *Rogerm*, post mortem cujus *Agnētis* medietas eorundem tenementorum secundum Consuetudinem de Gavelykynde remansit & remanere debuit prædicto *Petro*, tenenda eidem *Petro* ad terminum vitæ ipsius *Petri*, scil. quamdiu sine aliâ uxore ducendâ se teneret; & alia medietas eorundem tenementorum inter prædictum *Willum* filium *Petri* & *Rogerm* fratrem ejus æqualiter partita fuit, Et dicunt quòd postea, prædicto *Will'o* filio *Petri* ætatis quindecim annorum existente, quando idem *Will'us* fuit plenæ ætatis secundum Consuetudinem de Gavelykynde, scil. post quintum decimum annum completum, per quoddam scriptum confectum apud London concessit & dimisit prædicto *Petro* omnes terras & tenementa cum pertinentiis, quæ habuit

that the Plaintiff was seised as of a Moiety of the Inheritance of his late Wife, by the Custom of Gavelkind, to hold while sole.

And being seised, the Tenant at the Age of 15 released, &c.

buit sive habere potuit in villis prædictis per successionem hæreditariam de prædicta Agnete matre ipsius Willⁱ, tenendum eidem Petro ad terminum vitæ ipsius Petri; prædictis tenementis, unde Assisa ista arrainata est, in seisinâ prædicti Petri existentibus: Qui quidem Will^{us} postea rediens ad prædicta tenementa factum suum prædictum patriæ notificavit & ratum habuit. Et dicunt quòd prædictus Petrus postmodum se maritavit & cepit uxorem, & quòd prædictus Rogerus frater postnatus, quamcito constabat ei quòd prædictus Petrus maritavit se, ut prædictum est, vendicavit residuum prædictæ medietatis, quam prædictus Petrus tenuit secundum Consuetudinem prædictam, quæ ei accrevit ratione quòd idem Petrus cepit uxorem, & quòd idem Petrus medietatem dictæ medietatis, quam idem Petrus tenuit per prædictam Consuetudinem de Gavelykynde de parte ipsius Rogeri, liberavit eidem Rogero: Et quòd prædictus Will^{us} Querens, sciens quòd prædictus Petrus pater suus ceperat uxorem, sicut prædictum est, nullum claimum apposuit versus ipsum Petrum pro parte suâ de hæreditate habendâ, sed morabatur cum ipso Petro per unum annum & dimidium, postquam idem Petrus cepit prædictam uxorem suam secundam, absque aliquo impedimento prædicto Petro inde faciendo; & sic idem Petrus remansit in seisinâ de prædictis tenementis per totum tempus prædictum pacificè, quousque prædictus Will^{us} filius Petri ipsum Petrum inde ejecit. Ideo Consideratum est quòd prædictus Petrus recuperet seisinam

And that the Plaintiff afterwards married a second Wife, and upon the Claim of Roger, one of the Sons, delivered to him his Purparty of the said Moiety, as forfeited.

But W^m. made no Claim for above a Year and a Half, &c.

Book II.

Judgment for
the Plaintiff,
because the
Tenant had
released, &c.

* Note; The
Words, *fuit
plene ætatis*,
seem to be
left out of the
Record; for
they are ne-
cessary to
compleat the
Sense.

* suam de medietate prædictorum tenemen-
torum, unde queritur se disseisiri, scil. de illâ
medietate, quæ cecidit in propartem præ-
dicti *Will'i filii Petri*, quando partici-
patio prædicta facta fuit inter ipsum
Willum & Rogerum fratrem ejus, ut præ-
dictum est, per visum Recognitorum, &
damna sua, quæ taxantur per eosdem
ad unam marcam; & *Willus* filius *Petri* in
mîa, &c. Et quoad aliam medietatem eo-
rundem tenementorum, quæ remansit præ-
dicto *Petro* post mortem prædictæ *Agne-
tis*, tenenda eidem *Petro* secundum Con-
suetudinem de Gavelykynde in forma præ-
dictâ, ut prædictum est, Dies datus est
eis de audiendo judicio suo hîc die Mar-
tis, &c. Postea ad illum diem venit præ-
dictus *Petrus*, & alii non venerunt; &
quia per Affisam prædictam compertum est,
quod prædictus *Willus* * secundum Con-
suetudinem de Gavelykynde, tempore quo
concessit & dimisit prædicto *Petro* præ-
dictam medietatem, quæ ei remansit, &c.
& factum suum cum patriâ istâ ratum ha-
buit, moram faciens cum prædicto *Petro*,
ut prædictum est; & quod idem *Petrus* sei-
sinam suam inde continuavit, quousq;
prædictus *Willus* postea per longum tem-
pus ipsum *Petrum* inde contra factum su-
um ejecit, Consideratum est quod præ-
dictus *Petrus* recuperet inde seisinam suam
per visum Recognitorum, & damna sua,
quæ taxantur per eosdem ad unam mar-
cam; & *Willus* in mîa; Et similiter præ-
dictus *Petrus* in mîa pro falso clamore ver-
sus alios in brevi, &c.

There

There is a Report of this last Case, among others of the same *Eyre*, given to *Lincolns Inn Library*, by *Hale Ch. Just.*

And it appears further by *John Scerre's Case*, to be found *inter Plac. Ass. in Com. Kane. 3 Ed. 2.* And *Alexander de Greenheth's Case*, *Ass. in eod. Com. 15 Ed. 2.* & *Robert le Pykoc's Case*, *Ass. in eod. Com. 17 Ed. 2.* & *19 Ed. 2.* & *William de Adehullegate's Case*, *Ass. in eod. Com. 19 Ed. 2.* That Tenant by the Curtesy of Gavelkind Lands is intitled but to a Moiety.

9 Ed. 3. 38. a. A *Præcipe* brought against a Man, who pleads that the Tenements are of the Nature of Gavelkind, and that he holds them as *Free Bench* in the Name of Dower, as a Moiety of the Tenements that were his Wife's, now of the Inheritance of *John* Son and Heir of his Wife, and prays Aid of him, and says he is under Age, &c. and thereupon the Parol demurred.

Mich. 13 Ric. 2. C. B. Rot. 645. Kane. Trespass.
In an Action of Trespass brought by *Richard Bak* and *William Holy* against *Tho. Claver*, for breaking their Close at *Bakchild* and *Tonge*, &c. and cutting down the Corn, &c.

The Defendant pleads, ' *Quod quædam* Defendant
' *Godelina Claver*, quæ fuit uxor ipsius pleads the
' *Thomæ Claver*, fuit seifita de uno messua- Custom of
gio & septem acris terræ cum pertinen- Gavelkind for
tiis in prædicta villâ de *Bakchild* in domi- the Husband
nico suo ut de feodo, quæ tenementa sunt to have a
Moiety of the
Estate of his
late Wife, while he lives unmarried, and intitles himself by it.

Book II.

de tenura de Gavelkynde in Comitatu
Kancie, & inde obiit seifita, & secundum
 consuetudinem de tenurâ de Gavelkynd
 de tenementis, unde mulieres sic seifitæ
 sunt, viri post mortem earundem mulie-
 rum debent tenere medietatem tenemen-
 torum illorum pro indiviso [* simul cum
 Hæredibus] earundem mulierum, dum
 tamen viri prædicti se tenent non mari-
 tatos; & dicit quòd prædicta *Godelina*
 obiit seifita de tenementis prædictis in
Bakchild, unde locus, in quo ipsi supponunt
 transgressionem prædictam fieri, est par-
 cella; post [cujus mortem] prædicti *Ri-*
cardus Bak & *Willus Holy* tenementa
 prædicta unde, &c. intraverunt, & terram
 inde feminaverunt, *Thomas Claver* ut
 vir ejusdem *Godelinæ*, pro eo quòd ad ip-
 sum pertinuit habendum medietatem se-
 cundum [consuetudinem] prædictam, in-
 travit tenementa prædicta, & medietatem
 bladorum super terram prædictam semi-
 natorum messuit, prout ei bene licuit, &c.

Plaintiffs re-
 ply, That the
 Custom is for
 the Husband
 to have a
 Moiety after
 Issue had, but
 not otherwise,
 &c.

The Plaintiffs reply, ' Quod consue-
 tudo de Gavelkynd talis est, quòd si hujus-
 modi viri & mulieres habeant exitum,
 inter se, quòd [tunc] hujusmodi viri habe-
 bunt medietatem terrarum & tenementorum
 mulierum prædictarum, dum tamen
 se tenuerint [non] maritatos, & si contin-
 git

* N. B. The Roll being much damaged by Wet is
 obliterated in all the Places between the [] and sup-
 plied only by the Sense.

‘git hujusmodi viros & mulieres non habere exitum inter se, [tunc] post mortem mulierum prædictarum non debent habere aliquam partem terrarum & tenementorum mulierum prædictarum, [& dicunt] quòd prædicta *Godelina* obiit sine hærede inter se & prædictum *Thomam Claver* exeunte; & hoc parati sunt verificare, unde petunt judicium & damna, &c.

‘Et prædictus *Thomas* dicit, quòd Consuetudo de Gavelkind talis est, quòd si hujusmodi [viri & mulieres] habeant exitum, siue non, quòd viri post mortem earundem mulierum debent habere medietatem tenendam in forma superiùs per ipsum *Thomam* declaratâ; absq; hoc quòd aliqua talis consuetudo habetur in Gavelkynde, prout prædictus *Ricardus Bak & Willus Holy* superiùs allegaverunt; & de hoc se ponit super patriam, &c. & prædictus *Ricardus Bak & Willus Holy* similiter. Ideo, &c. præceptum est vicecomiti quòd venire, &c. Ad quem diem venerunt partes prædictæ, & vicecomes non misit breve. Ideo sicut prius, &c. ad recognitionem, &c.’ But there is no Verdict entred.

Defendant rejoins, that the Custom gives the Husband a Moiety, whether there were Issue or no, and traverses the Custom alledged by the Plaintiffs.

Issue thereon.

And lastly, in an Ejectment between *Wood* on the Demise of *Walsh* and *Baker* against *Jefferies*, tried at the Summer Assizes for *Kent* in 1739, before the *Lord Ch. Just. Lee*, it was found to be the Custom of *Kent*, that the Husband, who has Issue by his Wife, shall be Tenant by the Curtesy of a Moiety only of her Gavelkind Lands.

And

Of Tenancy by the Curtesy.

Book II.

And accordingly *Baker*, the Tenant by the Curtesy, had a Verdict for a Part only. Indeed the Premises in Question being of small Value, the Matter was not greatly contested; the Proof of the Custom was by two Attornies of Note, who gave Evidence of the general Reputation of the County: And nothing was attempted to be proved to the contrary.

This Series of Precedents stands contradicted by no Case whatsoever, that I have been able to find, except a short *Anonymous* Note in *Style's Practical Register* 314, 322, where it is said to have been holden in *B. R. Mich. 22 Car.* that by the Custom of *Kent*, if a Man has Issue by his Wife, then he shall be Tenant by the Curtesy of all the Gavelkind Lands his Wife was seised of, and tho' he marry again he shall not forfeit his Estate. Were this Book of greater Authority than it is, (being but of little, except as to Matters of Practice) and the Case taken to be truly reported, it could not counterbalance the Weight of the others to the contrary. But I had the Curiosity to search the Rolls of that Term, and could find no Case entred on Record as of that Time, in which this Matter could come judicially before the Court.

Authorities to shew that the Husband is intitled to a Moiety as long as he lives unmarried, tho' no Issue had.

I shall proceed to shew in the next Place, that the Custom of *Kent*, tho' less indulgent than the Curtesy of *England* to such Husbands as have Issue by their Wives, is more favourable than the Common Law to those that have none, giving them an equal Advantage

vantage with the others, viz. *A Moiety as long as they live unmarried.* And notwithstanding this be made a Doubt in the Record last cited of *Mich. 13 Rich. 2.* yet that Case is in some Measure an Authority for the Custom; for the Defendant, who claimed to be Tenant of a Moiety, tho' no Issue had, having taken Possession of the Premises, the not bringing on the Cause to Trial was a Kind of tacit Acquiescence in his Right. And tho' some of the foregoing Records, which say, that *ratione Proles suscitatae, &c. tenuit*, seem to make that a previous Qualification, yet they are properly explained and answered by the following Authorities.

First the *Customal* itself: "If a Man
" take a Wife that has Inheritance of
" Gavelkind, and the Wife dies before
" him, let the Husband have the Moiety of
" those Lands and Tenements, whereof she
" died seised, so long as he holds himself a
" Widower, without doing any Estrepe-
" ment, Waste or Exile, *whether there were*
" *Issue between them, or not:* And if he
" takes another Wife, let him lose all."

In a Writ of Dower brought for a Moiety, in *Itin. Kanc. 25 H. 3.* (to be found in the *Appendix to Somner on Gavelk. 179.*) by *Burga* late Wife of *Peter de Bendings* against the Prior of the Holy Trinity in *Canterbury*, the Demandant *dicit, quòd Manerium est Gavelkinde & partibile, ita quòd Robertus de Valoignes Dominus de Sutton, qui duxerat in uxorem Matildam de Welles, cujus Hereditas illud Manerium fuit, post mortem illius Matildæ*

Of Tenancy by the Curtesy.

Book H.

tildæ habuit nomine Franci Banci medietatem illius Manerii. And no Mention is made of any Issue between them.

Assize.

The Plaintiff
makes Title
as Tenant by
the Curtesy of
a Moiety by
the Custom
of Gavelkind.

Nor is having Issue set out as necessary to intitle the Husband to a Moiety, by the following Record of *Itin. Kanc. 39 H. 3. Rot. 26. in dorso.* ‘ *Affisa venit recognitura*
‘ *si Andreas Cokin, custos terræ & hæredis*
‘ *Laurence filii Jobannis le Bretun, & alii*
‘ *injustè & sine iudicio disseisiverunt Roge-*
‘ *rum le Linus de libero tenemento suo in*
‘ *suburbio Cantuar.* Et unde queritur quòd
‘ *disseisiverunt eum de medietate undecim*
‘ *acrarum terræ, &c.* Et dicit quòd præ-
‘ *dicta terra aliquo tempore fuit jus & hæ-*
‘ *reditas cuiusdam Godelinæ quondam uxoris*
‘ *suæ, & ipse Rogerus post mortem prædictæ*
‘ *Godelinæ fuit in seisinâ de medietate præ-*
‘ *dictæ terræ ut de libero tenemento suo secun-*
‘ *dum consuetudinem Kancie per magnum*
‘ *tempus, quousq; prædictus Andreas & alii*
‘ *inde ipsum disseisiverunt.*

‘ Et *Andreas & alii* veniunt, & *Andreas*
‘ dicit, quòd injuste tulit istam Affisam,
‘ quia dicit, quòd prædictus *Rogerus* nullum
‘ liberum tenementum potuit clamare in
‘ prædictâ terrâ post mortem prædictæ *Go-*
‘ *delinæ* uxoris suæ, quia benè cognoscit
‘ quòd prædicta terra fuit jus & hæreditas
‘ prædictæ *Godelinæ* uxoris suæ, sed dicit,
‘ quòd prædictus *Rogerus*, antequam præ-
‘ dictam *Godelinam* desponsasset, concessit
‘ ipsi *Godelinæ* quòd si contingeret ipsam
‘ decedere ante prædictum *Rogerus*, quòd
‘ idem *Rogerus* nihil clamare posset in aliquâ
‘ parte prædictorum tenementorum ratione
‘ *liberi*

liberi Banci sui, sed prædicta tenementa descendere deberent ad hæredes ipsius Godelinæ: Et dicunt quòd hac ratione posuit se in seisinâ quædam Lauretta de prædictis tenementis integrè; unde dicunt, quòd si prædictus Rogerus disseisitus sit de prædictis tenementis, per ipsos non est disseisitus, immò per prædictam Laurettam; & de hoc se ponit super Assisam.

Juratores dicunt, quòd prædictus Rogerus per magnum tempus post mortem prædictæ Godelinæ fuit in seisinâ de medietate prædictorum tenementorum ut de libero Banco suo, & postea venerunt prædictus Andreas & alii, & ipsum de prædicta medietate ejecerunt; unde dicunt quòd prædictus Andreas & alii prædictum Rogerum injuste disseisiverunt. Ideo consideratum est quòd prædictus Rogerus recuperet seisinam suam per visum juratorum, & prædictus Andreas & alii in mîa.

Verdict and Judgment for the Plaintiff.

Pasc. 16 Ed. 3. Fitzb. Aid, 129. It is pleaded that the Husband held the Land of his Wife by the Usage of Gavelkind, tho' they never had any Issue between them, and not denied.

Pasc. 19 Ed. 3. Aid, 144. It is pleaded, that by the Usage of Gavelkind in Kent, the Husband shall, after the Death of the Wife, hold the Moiety of the Lands of the Inheritance of the Wife, as long as he lives unmarried. And it is mentioned in the Case, that the Wife died without Issue. Note, in the Printing of that Case the Words *le Baron* are misplaced.

Of Tenancy by the Curtesy.

Book II.

In the Case of *Dane v. Johnson & al.* *Pasc. 4 Eliz. C. B. Rot. 1022. Kant. Co. Ent. 602.* It is pleaded, that the Lands are, and from Time to the contrary whereof, &c. have been, of the Nature and Tenure of Gavelkind in the County of *Kent*; "and that the Husband of every Wife dying seised of any Lands or Tenements in the said County, of the said Nature or Tenure, in her Demesne as of Fee-simple or Fee-tail, according to the Custom in the said County, for all the Time aforesaid used and approved, ought and have used to hold and enjoy the *Moiety* of all such Lands and Tenements, of which such Wife died seised, as aforesaid, after the Death of such Wife so dying seised as aforesaid, during the Life of such Husband, *if such Husband lived sole and unmarried*; and that the said *Nich.* was, and yet is seised of the said *Moiety* with the Appurtenances in his Demesne as of Freehold, as Tenant thereof by the Custom aforesaid." It appears indeed by the Case that the Husband had Issue by his Wife, but that Circumstance is not supposed to be necessary, the Custom being pleaded in general for the Husband of every Wife.

By the Custom of Gavelkind a Man shall be Tenant by the Curtesy without having any Issue. *Co. Litt. 30. a. 111. a.* And the same Thing is agreed in 2 *Sid. 153. Browne and Brookes, and Wiseman and Cotton, Raym. 76.*

Tenapt

Of Tenancy by the Curtesy.

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Chap. I.

Tenant by the Curtesy of *Kent* of Gavelkind Lands, whether he have Issue or no, until he marry. *Noy's Max.* 27.

By the Custom of *Kent*, if the Wife is seised of Gavelkind Lands, and dies without having had Issue by her Husband, he shall be Tenant by the Curtesy of Half the Lands, so long as he lives unmarried; but if he marry again, he shall forfeit his Estate in the Land. *Mich.* 22 *Car. B. R. Style's Pract. Reg.* 314, 322.

Maritus uxoris decedentis, sine liberis ex ea suscepit, sine non, terras hujus generis [Gavelkind] accipit ex semisse, quamdiu manet innuptus. Tho. Smith de Rep. Angl. 109.

Add to these this Verdict in the very Assise.

Point. ' *Ass. in Com. Kanc.* 16. *Ed.* 2. *Ass.*

' sifa venit recognitura si *Willus de Dagen-*

' *bam & Johannis de Estlond* injuste, &c.

' disseisiverunt *Willum le Pede* de libero te-

' nemento suo in *Stoke in Hoo*, & *Villis Sanc-*

' *te Mariæ, Sanctæ Werburgæ & omnium*

' *Sanctorum in Hoo* post primam, &c. & un-

' de queritur, quod disseisiverunt eum de me-

' dietate triginta quinque acrarum terræ, &

' quatuor viginti acrarum marisci cum per-

' tinentiis.

' Et *Willus de Dagenbam & Johannes* ve-

' niunt, & respondent ut tenentes, &c. &

' dicunt quod Assisa inde inter eos fieri non

' debet, quia dicunt quod quædam *Margeria*

' mater ipsorum *Willi & Johannis*, cujus

' hæredes ipsi sunt, aliquando tenuit præ-

' dicta tenementa in visu posita, & inde o-

' biit seisita in *Dominico* suo, &c. secun-

X 2

' dum

Tenants make
Title as Heirs
to their Mo-
ther.

Plaintiff replies, that he is entitled to a Moiety as Tenant by the Curtesy by the Custom of Gavelkind, tho' no Issue had.

Verdict finds the Custom accordingly.

dum Consuetudinem de *Gavelykynde*; post cuius mortem ipsi intraverunt ut hæredes, &c. & prædictus *Will'us Pedes*, qui fuit vir ipsius *Margerie*, intrusit se in prædictis tenementis, & ipsi hoc permittere noluerunt pro eo quod non fuit exitus inter eos; unde petunt iudicium si de hac intrusione Assisam inter eos habere debeat.

Et *Will'us Pedes* dicit quòd secundum Consuetudinem de *Gavelykynde* quilibet vir habere debet medietatem terrarum & tenementorum, quæ fuerunt uxoris suæ de hæreditate suâ, ad tenendum ut liberum tenementum suum dummodo, &c. unde dicit quod secundum Consuetudinem prædictam ipse intravit in prædicta tenementa, sicut ei bene licuit, & inde fuit seiscitus ut de libero tenemento suo, quousq; prædicti *Will'us Dagenham* & *Johannes* ipsum inde injustè disseisiverunt, &c. Et *Will'us* & *Johannes* dicunt quod non est hujusmodi Consuetudo in *Kanciâ* de tenementis de *Gavelykynde*; & de hoc ponunt se super Assisam, & prædictus *Will'us Pedes* similiter: Ideo capiatur Assisa.

Juratores de assensu partium electi dicunt super sacramentum suum, quòd Consuetudo de *Gavelykynde* talis est, quòd quilibet vir habere debet post mortem uxoris medietatem omnium terrarum & tenementorum, quæ fuerunt ipsius uxoris de hæreditate suâ, sive habeatur exitus, sive non, ad tenendum ut liberum tenementum suum, quousque ea forisfecit secundum Consuetudinem prædictam. Et quia prædictus *Will'us Dagenham* & *Johannes* satis cognoverunt in Curia

riâ, quod prædictus *Willus Pede* seifitus
fuit de tenementis in visu positis, & per
eos disseifitus, Ideo *Consideratum* est quod
recuperet inde seifinam suam per visum re-
cognitorum, & similiter damna sua, quæ
taxantur per Juratores ad tresdecim solidos
& quatuor denarios: Et *Willus de Da-*
genbam & *Johannes* committuntur Goalæ.
Postea fecerunt finem cum Domino Rege
pro quadraginta denariis, &c.

Chap. I.

Judgment for
the Plaintiff.

And to close all ; this Custom, as set down
in the *Custumal*, more beneficial in one re-
spect than the Common Law, that the
Husband shall hold over, tho' he never had
Issue by his Wife, but less in others, *viz.* that
he shall have but one Half, tho' he have
Issue, and that with a Prohibition of second
Marriage, Mr. *Lambard*, who was well ac-
quainted with the State of the County, af-
firms to have holden Place, and to have
been put in Practice in his Time. *Peramb.*
⁶¹⁵₃₃₅. And according to the best Inquiry I
have been able to make, the same is the
general Reputation of the County at this
Day.

There is a Law among those of *Hen. I.* that
may give some Colour to a Conjecture that
this Custom took its Rise from the common
Source, of our Gavelkind Customs the old
Common Law: It is the 70th Law of that
King ; where, after Mention of the Wife's
Dower in case she survived her Husband, it
is said, *Si Mulier absque liberis moriatur,*
* *Pa-*

The Rise of
this Custom.

** Parentes ejus cum Marito partem suam dividant.*

Of Waste

Tenant by the Curtesy by this Custom has no more Power of committing Waste than such Tenant by the Common Law. *Customal of Kent, infra. Itin. Kanc. 55 H. 3. Rot. 51. Ante 139. Lamb. Peramb. 615.*

* Here the Word *Parentes* signifies Kindred or Relations in general, according to the Signification of the French Word *Parent*, and is so used several Times in the same Laws. *Vide 75th Law H. 1. Et vide Stat. Merton. c. 6. & Litt. Sect. 108.*

C H A P. II.

Of Dower.

THE customary Dower of Lands in Gavelkind was formerly called by the Name of *Free Bench*. *Itin. Kanc.* 39 *H.* 3. *Rot.* 4. and *Rot.* 19. *Itin. Kanc.* 55 *H.* 3. *Rot.* 60. 25 *H.* 3. *App. to Somn.* 178.

The several Qualities whereof different from the Common Law, may be considered under the following Heads,

1. Of what Part the Widow shall be endowed. 2. The Conditions by which her Estate may be defeated. 3. Of what Things she shall be endowed. 4. Of what Estate of her Husband. 5. What Remedies she may have for her Dower. 6. The Manner of demanding this customary Dower. 7. The Manner of Assignment. 8. Of Waivure of her customary Dower.

1. By the Custom of *Kent*, the Wife, after the Death of her Husband shall have for her Dower a *Moiety* of all his Lands and Tenements of the Nature of Gavelkind. *Lamb. Peramb.* 615. *Stat. de Consuet. Kanc. Stat. de Prærog. Regis*, c. 16. 7 *Ed.* 2. *Mayn.* 236. *Itin. Kanc.* 8 *Ed.* 2. *Affise*, 386. 13 *Ed.* 3. *View*, 104. *F. N. B.* 150. *O. Cro. Eliz.* 121, 825. 21 *Ed.* 4. 54. a. *Cro. Car.* 562. *Co. Lit.* 33. b. 111. a. *T. Jones*, 6. 2 *Sid.*

1. Of what Part the Widow shall be endowed.

Book I.

154. 1 *Sid.* 138. *Raym.* 76. *Dav.* 50. *Somn.* 48, 53, 146. And Numberless Instances in the *Kentish Iters.*

2. On what Conditions.

2. But she holds not her Dower absolutely for Life, but only as long as she lives Chaste. 21 *Ed.* 4. 54. a. *Cro. Eliz.* 121. *Hunt and Gilburne.* *Ibid.* 825. *Davis and Selby.* *Tbo. Smith de Rep. Angl.* 109. *Noy's Max.* 28. *T. Jones* 6. *Lady Cobham and Tomlinson.* And unmarried. *Itin. Kanc.* 55 *H.* 3. *Rot.* 57. *Plac. Ass. in Com. Kanc.* 17 *Ed.* 2. *Joan Helles's Case.* *Cro. Eliz.* 121. *Ibid.* 825. *Noy's Max.* 28. *T. Jones* 6. *Co. Litt.* 33. b. 111. a. *Lamb.* 556. 8 *Ed.* 2. *Mayn.* 284. 2 *Ed.* 4. 19. *Moor* 260. If she commit Fornication in her Widowhood, or take a Husband after, she shall lose her Dower. *Stat.* 17 *Ed.* 2. *De Prærog. Reg. c.* 16.

The like Condition in Restraint of a second Marriage was antiently annexed to Dower at the Common Law. *Tenetur tamen Mulier cum assensu Warranti sui nubere, vel dotem amittet.* *Glanv. lib.* 7. c. 12. That is, with the Consent of the Heir, or him in Reversion, whom she may vouch by an implied Warranty. And in the same Sense is the Word *Warrantus* used concerning this Custom of *Kent.* *Plac. Ass.* 52 *H.* 3. in *Com. Kanc. Rot.* 17. *Post.*

Nor is it material by our Custom, whether the taking Husband be before, or after Dower be assigned; for if she marry before, she shall not afterwards be endowed, if after Assignment, the Heir may enter upon her. *Lamb. Peramb.* 560. *Somn.* 146.

Per

Per Consuetudinem, quæ in diversis locis pro lege observatur, si, cum fuerit ei Dos assignata, vel in Com. *Kanc.* ante assignationem nupserit alicui, statim amittit terram, quam tenet nomine Dotis de Gavelkind. Et de hac materiâ inveniri poterit de termino *S. M.* anno Regis *H. 2.* post guerram, in Com. *Kanc.* Et si seysinam habuerit, si non, si post mortem viri inventa fuerit *habens in utero conceptum* ab alio quam viro suo, si nupserit, & licet nupta non sit, *si vir inveniatur, vel puer, vel uterque*, dotem amittet. *Braet. lib. 4. 313. a.*

The Record above-cited of *M. 2 R. H.* Mr. Somner takes to be the Case of *Isabella de Gravenel* mentioned a little higher in *Braet. p. 308. b.* where the Custom is thus pleaded, *Quod si ve [Vidua] fuerit in seysinâ, si non, si post mortem viri sui alium capiat, amittere debet dotem, si in seysinâ fuerit; si autem extra seysinam, debet amittere clameum.*

But tho' Chastity, as well as a single Life, be a Condition of her Estate, yet it may be a Question whether the Custom require not a particular Kind of Proof of her Incontinency, before a Forfeiture shall be incurred. How the In-continency must be proved in order to a Forfeiture.

Mr. Lambard, *Peramb. 616. 336.* as to this Matter says, that the "Tenant in Dower has
" some Conditions waiting on her Estate;
" one, that she shall not marry at all; an-
" other, that she take diligent Heed, that she
" be not found with Child begotten in For-
" nication, &c. so that the Sin of secret
" Lechery is but in a sort forbidden, seeing
" that by the Custom she forfeits not in the
" latter Case, unless the Child be born, and
Y heard

Book II. "heard to cry, and that of the Country
 " People assembled by Hue and Cry."

And he is supported in his Opinion by the
 ' *Consuetudines Kancie* : Ele eit le Moytie
 ' de celes Terres & Tenements a tener tant
 ' come ele se tient * Veuve, ou de enfanter
 ' soit atteint per le ancien Usage, ceo est
 ' ascavoir que quaut ele enfaunt, e le en-
 ' faunt soit oy crier, e que le Hu e le Cry
 ' soit leve, e le Pais ensemble, e eyent vieve
 ' de la Enfaunt e de la Mere, adonks perde
 ' son Dower entierment, e autrement nyent,
 ' tant come ele se tient Veuve.'

Assise.

And this is further verified by *Trin. 17 Ed. 3. coram Rege Rot. 32 Kanc.*† Where in an Assise brought by *Roberge*, late Wife of *John at Combe*, against *Thomas* Son of the said *John*, for a Rent of 15s. and other Tenements in *Wodnesberge*, *Folkestane*, and *Efsbe* near *Sandwich*, the Tenant pleads that the Rent, &c. is Gavelkind, and assigned by him to the Plaintiff as her Dower, ' Et

Bar, that the Premises were the Dower of the Plaintiff, and by the Custom of Gavelkind forfeited by her having a Child.

' Quòd talis est usus de Gavelkynde, quòd si
 ' Viduæ post mortem maritorum suorum se
 ' maritaverint, vel aliquem puerum in || *Se-*
 ' *neuciâ* peperint, & puer ille visus fuit, aut
 ' cõg-

* Or as the *Customal* printed by *Tottel* has it, *Vensue ou defensantee, de enfant soit atteint per auncientz Usages, cestascavoir, &c.*

† Note, The same Record occurs *Int. Plac. Ass. Kanc. 10 Ed. 3.* and was removed into *B. R.* by *Certiorari* in order to Execution.

|| *Seneucia* in this Record signifies Widowhood. *Co. Litt. 33. b. in Marg.*

‘ cognitus, vel vagiens five clamans audiatur,
 ‘ statim Viduæ illæ secundum usum prædic-
 ‘ tum dotem suam amittent & forisfacient :
 ‘ & dicit quòd prædicta *Robergia*, postquam
 ‘ ipsa dotata fuit de reddito prædicto & præ-
 ‘ dictis tenementis, unde, &c. peperit quan-
 ‘ dam filiam *Johannam* nomine in Seneuciâ apud
 ‘ *Reculvre*, generatam per quendam *Simonem*
 ‘ *Petitz*, quæ quidem filia visa fuit ibidem &
 ‘ cognita, per quod prædicta *Robergia* red-
 ‘ ditum prædictum, &c. secundum usum præ-
 ‘ dictum forisfecit ; unde petit Judicium, &c.

The Plaintiff, ‘ Non dedicit quin ipsa pepe-
 ‘ rit filiam in Seneuciâ, sed dicit quod usus de
 ‘ Gavelkynde non est talis, qualis prædictus
 ‘ *Thomas* superius allegavit ; quia dicit quod
 ‘ usus Gavelkyndensis talis est, quòd Viduæ
 ‘ dotatæ, post mortem virorum suorum pro-
 ‘ lem *peperentes* in Seneuciâ, dotem suam
 ‘ amittere non debent, nisi proles illa inve-
 ‘ niatur vagiens five clamans infra quatuor
 ‘ muros tenementorum illorum, de quibus
 ‘ viduæ sic fuerunt dotatæ, & quòd ipse, cui
 ‘ tenementa illa post mortem hujusmodi vi-
 ‘ duarum reverti debent, recenter post nas-
 ‘ centiam illius prolis Hutesium & Clamo-
 ‘ rem super prolem illam levaverit ; & hoc
 ‘ parata est verificare per Affisam, &c.

‘ Et prædictus *Thomas* dicit, quòd usus
 ‘ de Gavelkynde est talis, quod in *quocunque*
 ‘ *loco Comitatus prædicti* hujusmodi Viduæ
 ‘ peperint in Seneuciâ, & proles illa per quem-
 ‘ cunque visus fuit vel cognitus, vel vagiens
 ‘ five clamans audiatur, & clamor & hu-
 ‘ tesium levantur, quod Viduæ illæ secundum
 ‘ usum

Reply, that
 by the Cus-
 tom the Dow-
 er is not for-
 feited, unless
 the Child be
 found at its
 Birth by Hue
 and Cry with-
 in the House
 of which the
 Woman is
 endowed.

The Tenant
 rejoins, that
 wheresoever
 within the
 County the
 Child is found
 by Hue and
 Cry, the Dow-
 er is forfeited.

Book II.

The Jury
find the Cu-
stom accord-
ingly.

But that the
Tenant did
not raise the
Hue and Cry.

Judgment for
the Plaintiff.

‘ usum prædictum dotem suam amittere de-
‘ bent, & forisfient : & hoc petit quod in-
‘ quiratur per Assisam, & prædicta *Rob-
‘ gia* similiter. Ideò capiatur inde Assisa.

‘ Juratores dicunt, &c. quòd *talis est u-
‘ sus de tenementis, quæ tenentur de Gavelkinde
‘ in Comitatu isto, viz. quòd si Viduæ post
‘ mortem virorum suorum se maritaverint, vel
‘ filium vel filiam in Seneuciâ peperint, dotem
‘ suam amittent & forisfacient, in quocunque
‘ loco infra Comitatum istum proles illa fuerit
‘ inventa vagiens sive clamans ; ita tamen quòd
‘ ille, cui hujusmodi tenementa sic dotata re-
‘ verti debent, in propriâ personâ suâ, vel per
‘ ejus Custodem, sive amicum, si ipse fuerit infra
‘ ætatem, recenter post nascentiam illius proles,
‘ hoc est dum proles illa fuerit sanguinolenta,
‘ venerit, & super prolem illam Clamorem &
‘ Hutesium levaverit : & petunt discretio-
‘ hem Justiciariorum, &c. Juratores quæ-
‘ siti, ex quo non est deductum per prædic-
‘ tam *Robergiam* quin ipsa peperit filiam in
‘ Seneuciâ, si prædictus *Thomas* in propriâ
‘ personâ suâ, vel per ejus Custodem, sive per
‘ aliquem amicum suum, recenter, postquam
‘ prædicta *Robergia* sic peperisset, levavit
‘ Clamorem & Hutesium super filiam præ-
‘ dictæ *Robergie*, necne, dicunt, quòd non.
‘ Ideo Consideratum est quòd prædicta *Ro-
‘ bergia* recuperet seisinam suam, &c.*

And in *Co. Litt.* 33. *b.* it is said, that by
the Custom of Gavelkind the Wife shall be
endowed of a Moiety, so long as she keeps
herself sole, and *without Child*.

But

But contrary Authorities are not wanting to shew, that the Condition is still more strong, and that not only Child-bearing, a casual Consequence of Fornication, and the Detection of it in this publick Manner, but the Commission of the Act itself is a Forfeiture of her Estate; and so it was found by Verdict *Pasch. 4 Ed. 1. C. B. Rot. 21. Kanc.* and not *Rot. 2.* as is in *1 Roll's Abr. 558.*

Where in Bar of a Writ of Dower brought for a Moiety of Lands in Kent by Margery the Widow of John Godefrey, the Tenant pleads that it is the Custom of Gavelkind, *Quod Vidua amittet dotem, si fornicata vel maritata fuerit*, and that the Demandant had after the Death of her Husband a Son named William by one William de Emesby. The Demandant confesses the Custom, but replies, 'quod nunquam fuit convicta secundum Legem de Gavelkind; Dicit enim, quod ipse inquisivisse debuit per insidias, quando ipsa fuit in parturiendo, & tunc debuisset ipsam cum puero suo cepisse cum Clamore & Hutesio, &c.' The Tenant rejoins, 'Quod ipsa fornicata est, ut prædicitur, & quod ipsa non debet convinci in formâ prædictâ, & de hoc se ponit super patriam; & Margeria similiter. Ideò Venire faciat, &c. Postea Jurata dicunt, quod prædicta Margeria post mortem prædicti Johannis viri sui fornicata est cum prædicto Will'o de Emesby, de quo conceperat prædictum Will'm filium suum, & quod Lex & consuetudo de Gavelkynde talis est, quod si uxor post mortem viri

In a Writ of Dower.

' sui

Book II.

Verdict finds
the Custom of
Gavelkind to
forfeit Dower
for Fornicati-
on, tho' no
Hue and Cry,
&c.

' *sui nupserit se, vel fornicata fuit, amittit
' Dotem suam, & quòd non necesse est quòd ipsa
' capiatur cum puero suo in parturiendo cum
' Hutesio & Clamore. Ideo Consideratum est
' quòd Will'us & alii eant inde sine die, &
' prædicta Margeria nihil capiat, &c. Sed
' fit in m'ia, &c.*

Trespafs.

Plea, that the
Plaintiff being
Tenant in
Dower in Ga-
velkind, for-
feited by the
Custom, for
Fornication.

To this may be added *Trin. 5 Ed. 2.
Coram Rege, Rot. 4. Kanc. Alice* late Wife
of *Walter Northwoode* brought an Action of
Trespafs against *Henry Northwoode*, and
three others, for Breaking and entring her
House at *Mepeham, &c.* The Defendants
pleaded, ' *Quod Mos & Consuetudo de
' Gavelingkinde in partibus illis talis est,
' quòd Uxor post mortem viri sui, quamdiu
' se benè & honestè gesserit, habebit medietate
' tem omnium terrarum & tenementorum,
' quæ fuerunt prædicti viri sui, & si faciat
' transgressionem cum aliquo homine post
' mortem viri sui, amittat Medietatem ter-
' rarum, &c. & pro eo quòd prædicta A-
' licia fecerat Adulterium cum quodam Jo-
' hanne le Tayllur, & habuit quendam filium
' Johannem nomine, ipsi Henricus & alii in-
' traverunt domum, &c. secundum consue-
' tudinem prædictam: Henry having mar-
ried the Heir of the Husband. ' *Et præ-
' dicta Alicia dicit, quod nullam transgressio-
' nem fecit cum prædicto Johanne le Tayllur,
' nec cum aliquo alio; sed prædicti Henri-
' cus & alii de injuriâ suâ propriâ, &c. &
' hoc petit quòd inquiratur per patriam; &
' prædicti Henricus & alii similiter. Ideò
' veniat inde Jurata coram Rege a die
' Sancti Mich. in XV dies ubicunq; &c.
' Ad**

The Plaintiff
Nonsuit.

‘ Ad quem diem prædicta *Alicia* non est
‘ profecuta.’

Chap. II.

And the Words of *Braeton* above cited,
licet nupta non sit, si vir inveniatur, vel puer,
vel uterque, dotem amittat, are a further E-
vidence, that she may forfeit her Dower
without being convicted of Child-bearing by
the View of the Country.

The Statute *de Prærogativâ Regis* is like-
wise general, that *if she commit Fornica-*
tion in her Widowhood, or take Husband
after, she shall lose her Dower. And to
these may be added the other Authorities a-
bove cited, which say generally, that she
shall hold the Moiety so long as she lives
Chaste. And indeed could the Widow, who
breaks this Rule, avoid the Danger of a
Forfeiture, by withdrawing to lie in out of
the County, the Condition would be but of
very little Effect. Ante p. 160.

These Restrictions to Chastity and a Who may
single Life, being Limitations which deter- take Advan-
mine the Estate *ipso facto*, without Entry, tage of the
not the Heir only, as in Case of a Condi- Forfeiture,
tion, but any Stranger, who is interested,
may take Advantage of the Forfeiture. *Co.*
Litt. 214. b.

If Tenant in Dower of Gavelkind sows Of Emble-
the Land, and afterwards forfeits her Dower ments after
by Marriage or Fornication, the Heir shall Forfeiture.
have the Emblements, for her Estate is de- 2 Inst. 81.
termined by her own Act. So if she makes
a Lease for Years, and then takes Husband,
the Lessee shall not have the Emblements;
for tho’ his Estate is determined by the Act
of another, yet he shall not be as to the
Heir

Book II.

Heir in a better Condition, than his Lessor was. 5 Rep. 116. Oland's Case, which was the Case of a Feme Copyholder *durante viduitate*.

Where an Action lies for calling Tenant in Dower in Gavelkind Whore.

As Tenant in Dower of Gavelkind Lands holds only while she remains sole and chaste, she may maintain an Action against any Person calling her Whore, if done to impeach her Estate; within the Reason of the Case of *Bois and Bois*. 1 Sid. 215. 1 Lev. 134. Action on the Case for saying to a Widow, who held an Estate while she continued sole and chaste, that she was a Whore, and that he would throw her out of her living; falsely and maliciously with an Intent to oust her of her Estate: Moved in Arrest of Judgment, that no special Damage being laid, the Words were not actionable; but the Court held, that the Words coupled with the Declaration of the Party, import Damage in themselves in respect of her Estate.

Of the Custom not to forfeit Dower for Felony, see *post* c. 4.

3. Of what Things she shall be endowed of a Moiety.

3. As a Woman is to be endowed at Common Law of Lands and Tenements, *Litt. Sect.* 36. and *Co. ibid.* so is she dowerable of all Lands and Tenements in Gavelkind, as appears by the *Customal of Kent infra*. And the Writ of Dower in this Case, as well as the other, is *de Libero Tenemento* of the Husband; from whence it might naturally be inferred that the Dower is equally extensive in both Cases;

I

But

But tho' a Woman shall be endowed at Chap. II.
Common Law of the third Part of the Pro-
fits, of a Fair, *Co. Litt. 32. a. Fitzb. Dower*, Whether of a
81. yet it is said, that if the Custom be Bailiwick, or
that a Woman shall have for her Dower Fair. Profits of a

the Moiety of all the Lands and Tenements,
which were her Husband's, holden in Socage
within such a Precinct, if the Husband had
a Bailiwick or Fair in Fee during the Co-
verture holden within the same Precinct,
the Wife shall not have the Moiety thereof
for her Dower, *because it is no Tenement*,
and a Custom shall be taken strictly. *Perk.*
Seet. 435. Lamb. 612. Noy's Max. 28.
2 Sid. 139. Per Newdigate Justice. And
12 Ed. 2. Dower 157. seems to be to the
same Purpose, tho' the Case is somewhat
obscure. But otherwise it is of a Bailiwick
or Fair appendant to a Manor or Land
holden in Socage within such Precinct. *Perk.*
Seet. 436. Lamb. 612.

The first is undoubtedly true, if it be un-
derstood only of such Profits of a Fair, as
arise merely from the Franchise, as Toll,
&c. and issue not out of the Land; for
these not being holden by any Tenure can-
not be of the Nature of Socage, and con-
sequently not Gavelkind; but as such Pro-
fits of a Fair, which are rather issuing from
the Land than from the Franchise, (as Pick-
age and Stallage) may be of the Nature of Ante 79.
Gavelkind with regard to the Inheritance,
there is no Reason why the Widow should
not have equal Advantage with the Heirs,
and be intitled to a Moiety of them, as in-

Book II.



Co. Litt. 6. a.
19. b.

cident to the Soil of which she is endowed, they coming properly under the Description of the Word *Tenements*; which is a very large Term, comprehending not only Lands, and other corporeal Inheritances, which are or may be holden; but also all Inheritances issuing out of any of them, or concerning, or annexed to, or exerciseable within the same, tho' they lie not in Tenure; as Offices, Rents, Commons, Profits *apprender* out of Lands, and the like, wherein a Man has any Frank-tenement, and whereof he is seised *ut de libero Tenemento*.

And accordingly Dower was demanded of the Moiety of Stallage arising from a Fair holden on Gavelkind Lands; and it was adjudged good without saying a Moiety of the Profits of the Stallage; for the Stallage is the Profits, and a Woman may be endowed of a Moiety of Stallage. 11 *Ed.* 3. *Fitzh. Dower*, 85.

Of Common
in Grofs.

Dower demanded of a Moiety of Pasture for sixteen Oxen, and six Cows, &c. to common in 500 Acres of Wood: Exception taken, that the Writ is *de libero Tenemento*, and the Demand of Common of Pasture, and therefore the Demand not warranted by the Writ; but the Court held it good, for that if she could not recover by this Writ and by this Demand, she would be without Remedy. 13 *Ed.* 2. *Dower* 161. *Mayn.* 405. *S. C.*

Of a Rent.

Rent or Common out of Land in Gavelkind, Borough English, & *bujuſmodi*, which is of antient Time, shall be of the Nature of the Land, so as a Wife shall be endowed

dowed of a Moiety, &c. *contra* of a Rent or Common newly granted, and therefore she shall be driven to shew, whether it is Common newly granted, or continued Time out of Mind, notwithstanding she alledge, that by the Custom of the Country the Wife shall have a Moiety of her Husband's Freehold in Dower. 4 *Ed.* 3. 32. *Fitzb. Dower*, 113. *Bro. Custom*, 58. But as it is now settled, that a Rent, tho' newly granted out of Gavelkind Land, shall follow the Nature of the Land, there is the same Reason, that the Wife shall be endow'd of a Moiety, as that all the Sons shall inherit.

That a Woman shall not be endow'd of Of Tithes impropriate issuing out of Lands in Gavelkind, *vide ante* 86.

4. The Words of the *Customal*, according to *Lambard's* Copy, are, that the Wife shall be endowed of a Moiety of the Tenements whereof her Husband *morust vestu e seisi*; and Mr. *Lambard* ⁶¹⁸/₃₃₃ is of Opinion, that the Wife shall not by this Custom be endowed of a Seisin in Law, as she should at the Common Law; but only of such Lands whereof her Husband was actually and really seised; the Word *Vestu* (according to his Interpretation) inforcing a Possession in Deed, and not in Law only: But he cautiously bids us enquire how the Usage is.

There is no Case in the Books to warrant this Opinion; and it is observable that the Word *Vestu* is not in the Edition of the *Customal* printed by *Tottel*, nor in a Manuscript

4. Of what Estate of the Husband a Woman shall be endow'd of a Moiety. Whether of a Seisin in Law,

manuscript Copy of that Record fairly written on Vellum amongst a Collection of the old Statutes now in *Lincoln's Inn* Library. But were Mr. *Lambard's* the right Reading, it might bear some Doubt whether he has not put too strong an Interpretation on this Word; for an Estate *vested*, by no means imports that the Tenant has a Seisin in Deed, but only that the Estate is not in Abeyance or Contingency; and undoubtedly the Estate *vests* in the Heir at Law immediately on the Death of his Ancestor, which is before Entry called a Seisin in Law.

But let the proper Sense of this single Word be what it will, it can scarce be sufficient to add so unreasonable a Qualification to the Custom, as that the Laches of the Husband in gaining an actual Seisin by Entry, shall prejudice the Wife, without a strong Usage accordingly.

Whether of the Husband's Estate aliened during the Coverture.

Another Question may arise on the Words *moruſt ſeizi*, viz. Whether the Custom be, that the Wife shall be endowed of a Moiety only of such Lands whereof Husband *died* seised?

And I take it there is no Difference in this Respect between the Common Law, and the Custom of *Kent*, but that, as is laid down in *Lamb. Peramb.* $\frac{615}{333}$, a Woman after the Death of her Husband shall have a Moiety of all such Lands of Gavelkind Tenure, whereof he was seised of an Estate of Inheritance during the Coverture.

For

For the Demand of this customary Dower of a Moiety is not of such Lands and Tenements only, of which the Husband died seised; but on the contrary in the *Old Entries* 109. and *Rast.* 237. is a Precedent of a Count in Dower, wherein the Demandant lays the Custom to be, that the Wives are dowable of a Moiety of the Tenements in Gavelkind, whereof their Husbands were seised after the Espousals.

And this Matter is put out of Doubt by the constant Manner of pleading *ne unq; seizi que Dower* to Demands of this customary Moiety, which is always in the common Form, *Die quo ipsam desponsavit, nec unquam postea, fuit seistus, &c. ita quod ipsam inde dotare potuit.* Instances whereof may be found in *Itin. Kanc.* 55 *H.* 3. *Rot.* 25. 34. in *dorso.* 48, 84, 89. *Itin. Kanc.* 7 *Ed.* 1. *Rex Roll.* *Rot.* 6, 10, 14, 22, 23. *Itin. Kanc.* 6 *Ed.* 2. *Rot.* 12, 28, 34, 103. 20 *Ed.* 3. *Ryley's Plac. Parl.* 112. *Rob. Ent.* 242, 271. And in *Coke's Ent.* 248. is a Judgment for the Tenant in Dower of Gavelkind Lands on this Issue found for her.

And lastly in the Case of *Davis* and *Selby*, *Cro. Eliz.* 825. It was adjudged, that the Wife should be endowed of a Moiety of such Lands of the Tenure of Gavelkind in *Kent*, as her Husband had aliered during the Coverture.

If two Men be Coparceners of Land in Not of Lands Gavelkind, and they make Partition, and recovered *pro* one of them takes a Wife, and the other is *ratā* in Aid. impleaded for his Part, and prays in Aid of

of his Coparcener, and he joins in Aid; and the Demandant recovers, and the Tenant has *pro ratâ* of that which was in the Possession of his Coparcener; and the Coparcener of whom the Aid was prayed dies; his Wife shall not have Dower of that which the other Coparcener has *pro ratâ*, because the Title of him, who has *pro ratâ*, shall have Relation to Time of the Death of their Ancestor. *Perk. tit. Dower, pl. 310.*

5. What Remedies lie for this Dower.

5. A Woman shall have the same Remedies for this customary Dower of Gavelkind, as for Lands at Common Law; as a Writ of Dower *unde nihil habet* in the common Form, *quòd reddat ei rationabilem dotem, &c. de libero Tenemento, &c.* and in her Count she shall demand the Moiety by the Custom. *Mayn. Ed. 2. 405. 30 Ed. 3. 26. a.* Or a Writ of Right of Dower of a Moiety according to the Usage of Gavelkind, where she has received Part, and is deforced of Part. *F. N. B. 8. H.*

As the Statute of *Merton, c. 1.* (which gives to the Wife deforced of her Dower, where the Husband died seised, Damages to the Value of the mean Profits of her Dower) is construed to extend to Copyholds, where by the Custom the Wife is dowable; for that when she is endowed she shall have all Incidents to Dower; *4 Rep. 30. b. Shaw's Case. Co. Litt. 33. a.* it seems that with equal Reason at least it will extend to Dower of Gavelkind Lands. And *Fleta, lib. 5. c. 24. f. 344.* speaking of this Provision of the Statute of *Merton*, and of Writs of Dower
unde

unde nihil habet, says, ' Primum commune
' breve, ut supra, per quod petitur tertia
' pars Tenementi, quod fuit viri fui die quo
' eam desponsavit, & postea, & aliquando
' Medietas, sicut de Socagio; non tamen
' de omnibus Socagiis, sed de antiquis,
' & de iis de quibus mulieres dotari con-
' sueverunt secundum loci & patriæ Consue-
' tudinem: Quod quidem breve quandoq; fit
' clausum, cum mulieres nihil habent omni-
' no, & quandoq; patens, cum aliquid ha-
' buerint, & aliquid defecerit. In brevi au-
' tem clauso adjudicantur damna Mulieribus,
' sed in patenti non.'

6. As Dower of a Moiety is against com- 6. Of the
mon Right, some Cause must undoubtedly Manner of de-
be alledged for it in the Demand. *Fitzb.* manding
Dower, 64, 65. 7 *Ed.* 3. 10. 10 *Ed.* 3. Dower of
35. * 13 *Ed.* 3. *Voucher* 20. 30 *Ed.* 3. 26. a. Gavelkind
Lands.

But the Question is in what Manner such
special Cause must be alledged:

It said in 5 *Ed.* 4. 8. *b.* That where a
Woman is to be endowed of a Moiety of
Gavelkind Lands, it is sufficient to shew the
Custom without prescribing in it. *Fitzb. Cu-*
stom, 4. Note, the Book itself is misprinted,
the Word *nemi* before *prescriber* being omit-
ted.

Dower demanded of a Moiety of 24 A-
cres of Land, for that the Land is of the Te-
nure of Gavelkind, & *secundum Consuetudinem*
in Com. Kanc. ab antiquo usitatam, Women
ought to be endowed of a Moiety of such
Lands; the Tenant prayed Judgment of the
Demand, because it was not said, according
to

to the Custom, *a tempore a quo non existit memoria usitatam*. But the Prothonotary certified that the other was the constant Course, and the Court said, they well knew there was such a Custom, and therefore awarded that the Tenant should answer. 2 *Ed.* 4. 19.

And there are several Precedents of Demands of Dower in *Kent* in this Manner in *Rast. Ent.* 235. *a.* 238. *b.* 239. *b.* But it seems this Manner of Demand would not be good for Dower of a Moiety of Lands in any other County, but the Custom ought to be more precisely alledged; as in the Precedents for Dower of a Moiety of Lands in *Norwich*, or within the Fee of *Richmond*. *Rast.* 235. *a.* 238. *b.*

And indeed it has been of later Times the more common Way to demand Dower of Gavelkind Lands in *Kent* according to the Custom *Time out of Mind* used, as appears by the Precedents, *Old. Ent.* 109. *Rast.* 237. *a.* *Co. Ent.* 248. 1 *Brownl. Decl.* 112. *Rob. Ent.* 267, 268, 285. And certainly this is the more adviseable and safe Way of Pleading since the Opinion of the Court, in the Cases of *Launder* and *Brooke*, and *Wise-man* and *Cotton*, that they will not take Notice of the particular Customs annexed to Gavelkind Lands, unless specially pleaded.

Another Exception taken to the Form of the Demand of this customary Dower in 2 *Ed.* 4. 19. was, that the Demandant did not shew, that she was without Husband, according to the Custom. But this is never averred in the Count, as appears by all the Precedents; and

and being a Condition to defeat her Estate, according to the general Rule laid down in 7 Rep. 10. *Ughtred's Case*; it ought to come on the Part of him that would take Advantage of it.

7. Mr. *Lambard* thinks, that this customary Dower differs from the Common Law in the Manner of Assignment; for that if the Wife recover her Dower at Common Law, she ought of Necessity to be endowed by Metes and Bounds; but in Dower after the Custom she may very well be endowed of a Moiety, to hold in Common with the Heir, who enjoys the other Half. And in this he is followed by Mr. *Noy* in his *Maxims*, p. 28.

7. How Dower of a Moiety is to be assigned. *Peramb.* 4¹/₂.

But the Instance put in *Perkins tit. Dower*, pl. 412, which Mr. *Lambard* cites as his Authority for this Position, is only of an Endowment of the Wife by the Heir, with her Agreement to hold in Common; and this is good by her Assent. And 8 Ed. 2. *Itin. Kanc. Fitzb. Entre*, 75. is to the same Purpose. Tho' in Truth the Case was in 6 Ed. 2. *Itin. Kanc.* and is more clearly reported amongst Cases of that *Eyre*, given by *Ch. J. Hale* to *Lincoln's Inn*; where *Spigurnel Just.* (who gave the Rule) holds, that the Law will well suffer the Heir to assign Dower to his Mother to hold a Moiety in Common with him *per mi & per tout*, but that it would be otherwise, if she were to recover her Dower by Judgment.

And though Consent of both Parties may take away the Necessity of an Assignment in Severalty, as well in Dower of a third

Style 276.
1 Roll's Abr.
Part 682. X. pl. 3.

Book II.

Part, as of a Moiety, yet it is certain, that where the Wife recovers this customary Dower by Course of Law, the Sheriff ought to assign it by Metes and Bounds, equally as in case of Dower at Common Law; as is expressly holden in the Case of *Davies and Selby*, *Cro. Eliz.* 825. That the Widow shall have the Moiety of Gavelkind Lands by Assignment in Severalty, and cannot hold in Common. And so 1 *Keb.* 583. That Feme Tenant of a Moiety in Dower by the Custom of *Kent*, doth recover by Metes and Bounds, and is no Tenant in Common, unless she were the Wife of a Tenant in Common.

Itin. Kanc. 39 *H.* 3. *Rot.* 19. *in dorso.* In a Writ of Right, ' *Jordanus & Godelina*
' dicunt, quod non possunt respondere; quia
' prædicta *Godelina* dicit, quod ipsa nihil clamat in prædicta terrâ nisi nomine *liberi*
' *banci* sui de dono cujusdam *Rogeri le Bonde*,
' patris prædicti *Jordani* & quorundam *Gilberti & Richardi*, cujus hæredes ipsi sunt;
' Et dicit quod ipsa & prædicti *Jordanus*,
' *Gilbertus*, & *Richardus* tenent prædictam
' terram in communi pro indiviso, ita quod *liberum* *bancum* suum nondum ei assignatum
' est.

And *Litt. Sect.* 43. speaks of Dower of a Moiety, according to the Custom, to hold in Severalty: Which may be a sufficient Answer to what is said *obiter* by *Jerman Just.* *Style* 277. in the Case of *Booth and Lambert*, that if Dower be of a third Part, it ought to

to be by Metes and Bounds generally; but if of a Moiety, it is not so. Chap. II.

Trin. 22 Jac. 1. Rot. 3286. 1 Brownl. Decl. 112. The Judgment in Dower of a Moiety of Gavelkind Lands is, to hold to the Widow in Severalty by Metes and Bounds: Tho' it is not necessary that the Judgment be so particular.

Indeed if there be two Coparceners in Gavelkind, and one takes a Wife and dies before Partition made, the Widow must of Necessity be endowed of the Moiety of a Moiety, to hold in Common; in like Manner as at Common Law the Widow of a Tenant in Common shall be endowed of a third Part of a Moiety, to hold in Common with the Heir and the other Tenant, for that in this Case her Dower cannot be assigned by Metes and Bounds. *1 Keb. 583. Litt. Sect. 44.*

This Distinction is supported by the Reason of the Law in other Cases: The Statute *Westm. 2. c. 18.* enacts, that the Sheriff shall upon an *Elegit* deliver to the Plaintiff a Moiety of the Land of the Debtor; and the Construction upon this has been that he shall deliver the Moiety by Metes and Bounds, unless the Defendant be a Jointenant, or Tenant in Common; and then this must be specially set forth in the Return. *Hutt. 16.*

1 Brownl. 38. 1 Vent. 259.

Mr. Lambard puts a Question, whether a Woman entitled to Dower in Gavelkind may wave her Dower of a *Moiety* after this Custom, and bring her Action to be endowed of a *third Part* at Common Law, and so exempt herself from the Dan- 8. Whether the customary Dower can be waved for Dower at Common Law.

Book I.

ger of the customary Conditions, or no? And he mentions, that he once heard two Reverend Judges of Opinion, that the Woman was at Liberty to demand her Dowry of a Third or of the Moiety; but that it was uttered by them on sudden Speech, and not on studied Argument. *Peramb.* ⁶²⁰₃₃₃, ⁶²¹₁₆₀. And he seems to mean the Opinion of *Anderson* and *Windham*, Justices, reported 1 *Leon.* 62. Which, as it was a sudden Opinion, so it is contrary to both the former and later Resolutions.

Certification
of Assise.

Plac. Ass. 52 H. 3. in Com. Kanc. int. Ass. de divers. Com. Rot. 17. ‘ Præceptum fuit
‘ Vicecomiti, quod venire faciat hîc ad hunc
‘ diem Juratores Assisæ novæ disseisinæ, quam
‘ *Thomas de Kanciâ & Cæcilia* uxor ejus ar-
‘ rianaverunt coram *Roberto Fulcone* versus
‘ *Johannem de Ripariis, Willm de Tracy,*
‘ *Radulphum de Bray, Johannem de Tracy &*
‘ *Margeriam* uxorem ejus, de tenementis in
‘ *Newton*, viz. de tertiâ parte unius Carucatæ
‘ terræ, ad certificandum de quibusdam ar-
‘ ticolis assisam prædictam tangentibus.

Count that the
Plaintiff in the
original Assise recovered
a Third Part
of a Carve of
Land, as her
Dowry; and
that by the
Custom of
Kent she for-
feited by mar-
rying again.

‘ Et prædicti *Thomas & Cæcilia* non vene-
‘ runt, & prædicti *Johannes, Willm, Radul-*
‘ *phus, & Johannes* venerunt, & dicunt quod
‘ prædicti *Thomas & Cæcilia* per prædictam
‘ Assisam recuperaverunt seisinam suam de
‘ prædicto tenemento ut dotem ipsius *Cæci-*
‘ *liæ*; & dicunt quod Consuetudo Comitatus
‘ *Kanciæ* de tenemento, quod tenetur in *Ga-*
‘ *velykende*, talis est, quod quamcito mulier,
‘ quæ dotata est de hujusmodi tenemento,
‘ nupserit se alicui, quod ipsa amittat dotem
‘ suam

‘ suam de tenemento, quod tenetur in *Gavelikende*; & quia prædicta *Cæcilia* nupsit prædicto *Thomæ*, prædictus *Willus* de *Tracy* seisivit prædictam *tertiā partem* in manum suam, ratione prædictorum *Johannis* & *Margerie*, qui sunt in Custodiā suā, ut *Jus* & *Hæreditatem* ipsius *Margerie*, sicut ei bene licuit per prædictam Consuetudinem; unde dicunt, quod *Affisa* prædicta minus sufficienter examinata fuit super prædicto articulo.

‘ Et *Juratores* examinati super isto articulo dicunt, quod prædictum tenementum, &c. tenetur in *Gavelikende*, & quod Consuetudo de tenemento, quod tenetur in *Gavelikende*, talis est sicut prædictum est, viz. quod siqua mulier dotata de tenemento, quod tenetur in *Gavelikynde*, nupsit se alicui, quod amittat dotem suam; Et quod liceat *Warranto* Dotis seisire prædictam dotem in manum suam. Et ideo *Considerandum* est quòd prædictus *Willus* de *Tracy*, ratione Custodiæ prædictorum *Johannis* & *Margerie*, rehebeat seisinam suam, &c.

The Jury find accordingly.

Judgment.

Exception taken to the Demand of Dower of Gavelkind Land in *Kent*, because it was of a *third Part*, and the Count was amended, and made of a *Moiety*. 2 *Ed.* 4. 19.

Dower of Gavelkind Lands in *Kent*, and demanded the *third Part* of the Land of her late Husband; the Defendant * pleaded, that the Custom there is, that Wives shall have a *Moiety* for their Dower, and shall hold it as long as they live chaste and unmarried, & non secundum Cursum Communis Legis; and that the Demandant had taken another Husband

* See a Precedent of such a Plea, *Robinson's Ent.* 245.

Book II.

band, and prayed Judgment if she should have her Dower ; to which the Demandant demurred : And the Court adjudged, that the Prescription in the Bar was good, being in the Negative ; and *Periam Just.* said, that if he had not pleaded in the Negative, yet the Demandant should not have Dower ; for the Custom, that Wives shall have the Moiety, is the Common Law in *Kent*, and no other Law runs there. 30 *Eliz. Rot.* 156. *Hunt & Uxor* versus *Gilburne*, *Cro. Eliz.* 121. *Goulds.* 108. 1 *Leon.* 133. *Moor* 260. *Sav.* 91. Indeed the Strength of this Case is much taken off by its being on Demurrer, which confessed the Custom in the negative and exclusive Manner in which it was pleaded.

But it was afterwards, upon Evidence on a Trial at Bar on this Issue, whether it was the Custom of Gavelkind, that if the Husband aliened his Land, the Wife might demand a third Part for her Dower, or a Moiety at her Election, resolved (the Demandant not being able to produce any Precedents, or Proofs, that there was any other Dower of Gavelkind Lands in *Kent* than Dower by the Custom) that the Custom precisely is, that she shall have a * Moiety; and as it is for the Benefit of the Tenant of the Freehold, that she should have the Moiety, she being thereby under the Restraint to hold it only while she lives sole and chaste, she

is

* This is likewise said to have been the Opinion of Lord *Dyer.* 1 *Leon.* 61.

is bound by the Custom, and cannot wave Chap. II.

it. *Davies & Uxor versus Selby, Cro. Eliz.*

825. and the same Case is cited *Moore* 260.

Which overthrows the Distinction to which Mr. *Lambard* seems to incline, from the Words of the *Custumal*, *Marust seizi*, That the Conditions laid upon this Dower run only to those Lands, whereof the Husband died seised, and that of such as he aliened the Wife was at Liberty either to demand Dower at the Common Law, or otherwise.

Peramb. 612.

By the Custom of Gavelkind, the Wife shall be endowed of a Moiety as long as she keeps herself sole, and without Child, which she cannot wave, and take her Thirds for Life, for in that Case *Consuetudo tollit communem Legem.* *Co. Litt.* 33. b.

By the Statute of *Merton*, c. 2. All Wi- Of devising
dows may devise the Crop growing on the the Crop on
Lands, which they hold in Dower; which customary
Words, *All Widows*, being general, comprehend Dower by the Custom, as well as other Dower.
Dower. 2 *Inst.* 81.

Before Endowments *ex Assensu Patris* were Dower *ex assensu Patris.*
disused by the Frequency of Jointures, the only Son of Tenant in Gavelkind could not have endowed his Wife *ex Assensu Patris* of such Lands, because, tho' he is Heir apparent at that Time, yet there is not that constant and perpetual Apparency that is necessary for that Purpose, since another Son may be born, that will have an equal Right to the Inheritance. *Co. Litt.* 35. b. 6 *Rep.* 22. a.
And

Book. II. And the same Law of the youngest Son and
 Heir apparent in *Borough English*. *Co. Litt.*
 35. b. 3 *Rep.* 38. a. 6 *Rep.* 22. a.

In what Places
 Dowry of a
 Moiety may
 be supported.

Note, A Custom to have a Moiety, or
 the whole for Dowry is so far favoured in
 Law, that it may not only be in a County,
 City, or antient Borough, but likewise in
 any Upland Town, which is neither City
 nor Borough. *Co. Litt.* 33. b. 21 *Ed.* 4.
 53. b. *Barre*, 119.

The Lands in the Territory of *Urchenseild*
 in *Herefordshire*, which descend after the Man-
 ner of Gavelkind, have the same Privilege of
 Dowry of a Moiety, as those in *Kent*. *Taylor*
 on *Gavelk.* 109. So have the partible Lands
 within the Port of *Rye* in *Sussex*.

Book II.

Age of Fifteen, this customary Guardian shall deliver up his Goods and Lands to him with the Improvements, and in all Things shall be charged and have Allowance as Guardian in Socage at Common Law. *Consuetud. Kanc. infra, Lamb. 611, 624.*

What Remedies to compel the Guardian to account.

But over and above the common Remedy for the Ward against the Guardian by Action of Account, the Lord may by the Custom distrain the Guardian to yield his Account. *Lamb. Peramb. 611, 624.*

Replevin; the Defendant makes Conufance as Bailiff of the Abbot of *St. Austin's* in *Canterbury*, for that the Usage of Gavelkind is, that the Heir, when he comes to the Age of fifteen Years, shall come to the Lord's Court, and demand his Inheritance, and the mean Profits of the Land; and the Lord by Usage of the Country, by Reason of his Seigniory, shall cause his Land to be delivered to him, and distrain his Guardian to yield his Account; and if he be found in Arrear, the Lord shall levy of him the Arrears by Distress; and accordingly makes Conufance under the Warrant of the Steward of the Abbot who was the Lord, to levy the Arrearage. *18 Ed. 2. Fitzb. Avowry, 220. Mayn. Ed. 2. 610.*

As an Action of Account lies at Common Law against Guardian in Socage *de son Tort, Litt. sect. 124.* So this Custom of compelling an Account by Distress extends to him, who is actually Guardian, whether by Right, or not. *18 Ed. 2. Avowry, 220. Mayn. Ed. 2. 610.* And Guardian by this Custom, tho' not *Prochein Amy*, but *de son Tort*, shall in like

Of the Customary Wardship, &c.

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like manner be chargeable in an Action of Account by the Heir, as soon as he arrives at the Age of Fifteen. 29 *Ed.* 3. 4. *b.* Chap. III.

But tho' the Guardian be himself accountable, yet the Lord, or his Heirs, stand chargeable in Default of the Ability of him, to whom they so commit the Custody. *Custumal of Kent, infra.* And this is the Reason why at this Day they seldom intermeddle in the Matter. *Lamb.* ⁶³²/₅₅₅, ⁶³⁵/₅₈₅.

When the Lord is chargeable in Default of the Guardian.

It is certain that this Custom of Gavel-kind, as to the Person to whose Custody and Care the Infant is committed, differs not in general from the common Socage Guardianship. *Rot. Claus.* 37 *H.* 3. *m.* 19. *in dorso.* 'Rex Vic. Kanc. Salutem. Certum 'est, & nulli sapienti de regno nostro dubium, quòd terrarum, quæ tenentur in 'Socagio vel Gavelikende, nulla pertinet ad 'Dominos earundem terrarum custodia, sed 'solummodò ad parentes propinquiores ex 'illâ parte, qui ad Successionem hæreditariam aspirare non possunt, &c.

Who is intitled to be Guardian.

'And *Itin. Kanc.* 43 *H.* 3. *Rot.* 13. 'Hundredum de Middelton. Juratores præsentant, quòd cum consuetudo sit per totam *Kanciam*, quòd quando aliquis obierit, 'qui terram teneret in Gavelikende, & 'Hæres suus sit infra ætatem, mater, vel 'parens propinquior ipsius hæredis ex parte 'matris habere debeat Custodiam ipsius hæredis, & terræ suæ ad *appruandum*, & respondendum de exitibus ejusdem terræ prædicto hæredi, cum ad ætatem pervenerit, & hoc absq; aliquo fine inde capiendo, &c.'

Affize.

The Tenant
pleads, that
the Tene-
ments are
Gavelkind
holden of the
Archbishop of
Canterbury ;

Who by the
Custom is in-
titled to the
Wardship of
the Tenant ;

and the Plain-
tiffs being In-
fants, he
granted the
Custody of
them to R. D.
who assigned
it to J. M.
who granted
it to the Te-
nant.

Yet formerly the Archbishop of *Canterbury* claimed, in Right of his Seigniorie, the Custody of the Body and Lands of the Ward, who held of him in Gavelkind, as a Thing assignable ; as appears by *Itin. Kanc. 6 Ed. 2. Rot. 7. in dorso.* ‘ *Affisa venit*
‘ *recognitura si Thomas filius Thomæ de Sand-*
‘ *wico, & alii disseisiverunt Will’um filium Jo-*
‘ *bannis de Hellis, & Thomam fratrem ejusdem*
‘ *Willi, de, &c. Et prædictus Thomas fi-*
‘ *lius Thomæ dicit, quòd ipse nullam fecit in-*
‘ *juriam, &c. Dicit enim, quòd prædicta*
‘ *tenementa sunt de Tenurâ de Gavelykynde,*
‘ *& tenebantur de Roberto nuper Archie-*
‘ *piscopo Cantuar’, &c. Et dicit quòd ta-*
‘ *lis est Consuetudo in Comitatu isto, quòd*
‘ *post mortem tenentium hujusmodi tenementorum*
‘ *de Archiepiscopatu, hæredibus eorum*
‘ *infra ætatem existentibus, seisiri debent tene-*
‘ *menta illa in manus ipsius Archiepiscopi, qui*
‘ *pro tempore fuerit ; qui quidem Archiepisco-*
‘ *pus habebit Custodiam prædictorum tenemen-*
‘ *torum, & Nutrituram Hæredum prædictorum*
‘ *usq; ad plenam ætatem eorundem secundum*
‘ *Consuetudinem prædictam : Et dicit quòd*
‘ *post mortem prædicti Johannis Patris præ-*
‘ *dictorum Will’i & Thomæ, cujus hæredes,*
‘ *&c. prædictus Archiepiscopus seisivit tene-*
‘ *menta prædicta unde, &c. in manum*
‘ *suam, nomine Custodiæ in formâ prædictâ,*
‘ *& custodiam illam commisit & concessit*
‘ *Roberto de Dene propinquiore sanguine*
‘ *prædictorum hæredum, cui tenementa illa*
‘ *descendere non potuerunt, &c. Qui qui-*
‘ *dem Robertus custodiam prædictam con-*
‘ *cessit cuidam Johanni de Malemeyns, &*
‘ *idem*

‘ idem *Johannes* ipsi *Thomæ*, tenendum usq; Chap. III.
 ‘ ad plenam ætatem: Et dicit, quod præ-
 ‘ dicti hæredes adhuc sunt infra ætatem; & Verdict that
 ‘ hoc paratus est verificare per Assisam. the Plaintiffs
 ‘ Ideo capiatur Assisa. Juratores dicunt &c. are under Age,
 ‘ super sacramentum suum, quòd prædicti
 ‘ hæredes non sunt plenæ ætatis secundum
 ‘ consuetudinem de Gavelkynde. Ideò
 ‘ consideratum est quòd prædictus *Thomas* Judgment for
 ‘ filius *Thomæ* eat inde sine die, & præ- the Tenant.
 ‘ dicti *Willus* & *Thomas* nihil capiant per
 ‘ Assisam, &c.

‘ So in *Itin. Kanc.* 21 Ed. 1. *Berewicke*
 ‘ *Roll. Rot.* 35. in dorso. Assisa venit re-
 ‘ cognitura si *Tho’ Rike* injuste disseisivit *Jo-* Assize.
 ‘ *bannem* filium *Radulphi Alged* de libero
 ‘ tenemento suo in Villâ de *Sto. Nicholao* in
 ‘ *Taneto*, &c.

‘ Postea venit prædictus *Thomas*, & dicit, The Tenant
 ‘ quod liberum tenementum prædictorum pleads, That
 ‘ tenementorum est prædicti *Johannis*, & the Arch-
 ‘ quod tenementa illa tenentur in Socagio: bishop com-
 ‘ Dicit etiam, quòd ipse nichil clamat in the Wardship
 ‘ prædictis tenementis, nisi custodiam ratione of the Plain-
 ‘ minoris ætatis prædicti *Johannis*, ex Com- tiff and these
 ‘ missione Ballivorum Archiepiscopi *Can-* Lands, &c.
 ‘ *tuariensis*, quibus ipse securitatem invene-
 ‘ rit de rationabili compoto suo inde reddendo
 ‘ prædicto *Johanni*, secundum consuetu-
 ‘ dinem de Gavelekynde, cum prædictus *Jo-*
 ‘ *bannes* ad plenam ætatem pervenerit, &c,
 ‘ & dicit, quod ipse modò paratus est hîc
 ‘ hujusmodi securitatem invenire, &c.

‘ Juratores

Book II.

Verdict finds
accordingly,
and that by
the Custom of
Gavelkind
the Archbi-
shop might
commit to
whom he
would the
Custody of the
Body and
Lands of his
Tenant under
Age, &c.

Judgment for
the Tenant.

Affize.

‘ Juratores dicunt super sacramentum
‘ suum, quod prædictus *Radulphus* obiit sei-
‘ situs de prædictis tenementis, ut de feodo;
‘ post cujus mortem Ballivi Archiepiscopi
‘ *Cantuar.* Custodiam prædictorum tene-
‘ mentorum, eò quod sunt de Gavelkynde,
‘ & Nutrituram corporis prædicti *Johan-*
‘ *nis* commiserunt cuidam *Jobannæ* matri
‘ prædicti *Johannis*, qui est infra ætatem,
‘ tenendum usq; ad legitimam ætatem ejus-
‘ dem *Johannis*, prout prædicto Archiepiscopo,
‘ per consuetudinem de Gavelekynde hucusq; u-
‘ sitatam, bene licuit hujusmodi Custodias cui-
‘ cunque committere: Dicunt etiam, quòd præ-
‘ dicta *Jobanna* postea desponsata fuit præ-
‘ dicto *Thomæ*, & postea obiit; post cujus
‘ mortem prædictus *Thomas* satisfecit Ballivis
‘ prædicti Archiepiscopi pro custodiâ præ-
‘ dictâ usq; ad legitimam ætatem ejusdem
‘ *Johannis* retinendâ ad commodum præ-
‘ dicti *Johannis*, & ad reddendum inde
‘ prædicto *Johanni* rationabilem compotum
‘ suum, cum ad legitimam ætatem pervene-
‘ rit; per quod prædictus *Thomas* Custo-
‘ diam illam semper postea retinuit. Ideò
‘ Consideratum est quòd prædictus *Thomas*
‘ eat inde sine die, & *Johannes* filius *Radul-*
‘ *phi* in mîa pro falso clamore, &c. Par-
‘ donatur quia infra ætatem.’

But the Right of this Claim is deeply
struck at by the following Verdict of the
same *Iter.*

‘ *Itin. Kanc. 21 Ed. 1. Berewicke. Rot.*
‘ *72. in dorso.* Affisa venit recognitura si
‘ *Radulphus* de *Berners*, & alii injustè dissei-
‘ siverunt

‘ siverunt *Willum* filium *Thome* de *Moraunt*, *Jordanum* & *Henricum* fratres ejus, de libero tenemento suo in *Chyveming* & *Sevenak*, &c.

Chap. III.

‘ Et *Radulphus* & alii veniunt, & *Radulphus* & *David* respondent pro se & aliis, & dicunt, quòd ipsi sunt Custodes Archiepiscopatus *Cantuariensis* ex parte Domini Regis constituti; & quia prædictus *Thomas*, pater prædicti *Willi* & aliorum, tenuit quandam partem prædictorum tenementorum de Archiepiscopatu, & Archiepiscopi semper habere consueverunt Custodiam de tenentibus suis consimilis tenuræ, & tam de tenementis, quæ de aliis tenentur, quam de illis, quæ tenentur de Archiepiscopatu, ipsi ceperunt prædicta tenementa in manus Domini Regis post mortem ipsius *Thome*, nomine custodiæ, eò quòd prædicti *Willus* filius *Thome*, *Jordanus* & *Henricus* filii ejus & hæredes, sunt infra ætatem.

The Tenants plead, that they are Guardians of the Temporalities of the Archbishoprick of *Canterbury*, and that the Archbishops used to have the Custody of their Tenants in Gavelkind when under Age, for all such Lands, whether holden of them, or not, and

make Title to the Premises accordingly.

‘ Et *Thomas* filius *Thome Moraunt*, frater prædictorum *Willi* filii *Thome*, *Jordani*, & *Henrici*, & qui sequitur pro eis, benè cognoscit, quòd prædictus *Thomas* pater ipsorum tenuit de Archiepiscopatu quandam partem prædicti tenementi, viz. unum messuagium, viginti & septem acras terræ, novem acras prati, & tres acras bosci tantum; & dicit, quòd tenementum illud est *Gavelykende*, de quo nulla debetur custodia, nisi proximo parenti, cui nulla hæreditas descendere potest; & qui compotum suum

The Plaintiffs reply, That but Part of the Land is holden of the Archbishop, and that it is Gavelkind, and the Wardship thereof to the next of Kin, &c.

‘ suum reddere tenetur, cum hæredes ad æ-
 ‘ tatem quindecim annorum pervenerint :
 ‘ Dicit etiam, quòd residuum prædicti tene-
 ‘ menti est *Gavelykend*, & non tenetur de
 ‘ Archiepiscopatu immediatè, & dicit quod
 ‘ totum prædictum tenementum est ex parte
 ‘ occidentali aquæ de *Medeway*, ubi tene-
 ‘ menta, quæ tenentur de Archiepiscopatu,
 ‘ sunt alterius Conditionis quàm illa, quæ
 ‘ sunt ex parte orientali aquæ prædictæ,
 ‘ nec aliqua Custodia inde debetur : Et quòd
 ‘ ita sit petit quòd inquiratur per Assisam ;
 ‘ Et quia prædicti Custodes nichil aliud di-
 ‘ cunt, ideò capiatur Assisa :

The Jury find
 accordingly,
 but that the
 Archbishop
 had usurped
 the Wardship
 of some Ga-
 velkind Land,
 especially on
 the East Side
 of the *Med-
 way*, but
 without any
 Right.

‘ *Juratores* dicunt super sacramentum
 ‘ suum, quòd totum tenementum est *Gavely-
 ‘ kend*, & quod prædictus *Thomas*, pater præ-
 ‘ dictorum *Willi* & aliorum, non tenuit de
 ‘ Archiepiscopatu immediatè, nisi unum mæs-
 ‘ suagium, viginti & septem acras terræ,
 ‘ novem acras prati, & tres acras bosci tan-
 ‘ tùm ; & quòd nulla Custodia inde debetur
 ‘ nisi proximo parenti, cui nulla hæreditas de-
 ‘ scendere potest, usq; ad quintum decimum an-
 ‘ num hæredum, & qui tunc illis compotum
 ‘ suum de exitibus reddere tenetur. Et *Jura-
 ‘ tores* quæsitæ si Archiepiscopi de tenemento
 ‘ isto, vel de aliis tenementis consimilis te-
 ‘ nuræ, unquam aliquam Custodiam habue-
 ‘ runt, dicunt, quòd *Johannes* Archiepisco-
 ‘ pus, qui ultimò obiit, injuriosè & per po-
 ‘ testatem occupavit Custodiam cujusdam
 ‘ terræ, quæ fuit *Baldewyni* de *Aldham*, post
 ‘ mortem ipsius *Baldewyni*, & similiter
 ‘ Custodiam cujusdam terræ in Manerio de
 ‘ *Northflete* tantùm : Et dicunt, quòd præ-
 ‘ dictus

dictus Archiepiscopus, nec aliquis præde-
cessorum suorum, unquam plures custodias
habuerunt ex parte occidentali aquæ de
Medeway: Sed dicunt, quòd prædictus
Archiepiscopus, & predecessores sui plures
Custodias injustè & per potestatem per
vices occupaverunt ex parte orientali aquæ
prædictæ; & præcisè dicunt, quòd de tene-
mentis tentis in *Garvelykend* nulla debetur Cu-
stodia nisi proximis parentibus, quibus nulla hæ-
reditas descendere potest. Dies datus est coram
Justiciariis Itinerantibus ibidem a die *Sancti*
Hillarii in xv dies de audiendo judicio suo.
Postea, quia compertum est per assisam istam,
quòd prædictus Archiepiscopus, qui ultimò Judgment,
obiit, & predecessores sui fuerunt in seisinâ &c.
habendi Custodias de aliis tenementis confi-
milis tenuræ, & prædicti Custodes partes
esse non possunt ad jus hujusmodi Custodiarum
discutiendum, Consideratum est quod præ-
dicti *Willus* filius *Thomæ*, *Jordanus*, & *Hen-*
ricus nihil capiant per Assisam; istam, &c.

Tho' the Custom puts some Confinement Of Alienation
on the Heir, by keeping him in Ward one by an Infant
Year longer than is permitted by the Course of 15.
of the Common Law, yet it makes ample
Amends to him, by a Favour allowed him
afterwards, which is to alien his Lands, as
soon as by attaining the Age of 15 Years he
is out of that Custody. *Custumal of Kent*, in-
fra. *Lambard's Peramb.* 625 625; *Somm.* 146.
Itin. Kanc. 6 Ed. 2. *Rot.* 69. *Trin.* 12 Ed. 1.
C. B. Rot. 68. *Mich.* 11 Ed. 3. *B. R. Rot.*
133. *Mich.* 20 *Ric.* 2. *B. R. Rot.* 62. *Plas.*
Ass. in Com. Kanc. 15 Ed. 2. *Alex. de Green-*

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beibe's Case, 12 Ric. 2. *Mich. Pour's Case*, 9 Ed. 3. 38, 39 Ed. 3. 10. b. 29 Ed. 3. 5. a. 32 Aff. 4. 11 H. 4. 29. b. *Dyer* 301. *Lowe and Paramour. Camd. Britan.* 284. And the Cases *infra*.

Itin. Kanc. 55 H. 3. *Rot.* 5. *in dorso*.
 * * TOTUS COMITATUS recordatur,
 * quod quilibet ætatis quindecim annorum te-
 * nens, vel tenere clamans aliquam terram in
 * Gavelykynde potest dare vendere terram
 * suam, de quâ fuit in seisinâ, ac etiam remit-
 * tere & quietum clamare totum jus & cla-
 * meum, quod habet, vel habere possit in aliquo
 * tenemento petendo; adeò licitè & liberè si-
 * cut quilibet alius ætatis viginti & unius
 * anni de tenuris forinsecis, quæ tenentur per
 * servitium militare.

This Custom extends to a Female Heir in Gavelkind of the Age of 15, as well as a Male; as appears by 11 H. 4. 33. *Itin. Kanc.* 55 H. 3. *Rot.* 25. *Aff. in Com. Kanc.* 2 Ric. 2. *Post.* . and 4 Ric. 2. *Post.* . and 13 Ric. 2. *Post.* . And is expressly so recorded *per totum Comitatum*, in *Itin. Kanc.* 7 Ed. 1. *Rot.* 47. *Rex Roll.*

The Restrictions attending this Custom.

But the later Resolutions and Practice have added the following proper and reasonable Restrictions to this customary Alienation:

1. That it must be by *Feoffment*. *Lamb.* 566. 11 H. 4. 33. 21 Ed. 4. 24. *Noy's Max.* 40. *Sed V. Post* 197.

And

* For the Meaning of this Expression, See *infra* c. 7.

And the Livery of Seisin must be *propria* Chap. III.
manu of the Infant, and not by Letter of
Attorney. *Lamb.* 627. *Noy's Max.* 40. For
this Custom, to enable a Person disabled by
Law, ought to be taken strictly, and there-
fore shall not extend to Feoffments by At-
torney, without a particular Custom for that
Purpose; for an Infant can do nothing to
pass a Thing out of him by Attorney. *9 Rep.*
76. *b. Combes's Case.*

Nor does the Custom extend to any o- *V. infr.* 197.
ther Conveyance or Assurance; for it shall
be taken strictly. *Lamb.* 627. *Noy's Max.* 40.

Therefore the Custom does not enable him
to make a Will of these Lands at 15. *Co.*
Copyb. Sect. 33.

And if an Infant before 27 *H.* 8. had made
a Feoffment warranted by the Custom to
his own Use, if he afterwards during his Non-
age devised the Use, the general Custom of the
County did not extend to make this Devise
good; for this Custom shall be taken strictly. 21
Ed. 4. 24. *Bro. Custom,* 50. 2 *Roll's Abr.* 779.

The Custom does not extend to the Grant
of a Reversion on an Estate for Life. 11
H. 4. 33. *Old Bendl.* 33. For that lies not
in Livery.

By the Opinion of *Hankford Justice,* 11 *Whether the*
H. 4. 33. *a.* the Custom does not extend to *Custom ex-*
a Release of a Right. And it is said generally *tends to a Re-*
in 5 *H.* 7. 31. *a.* 32. *a.* 41. *a.* that tho' there *lease. V. inf.*
be a Custom for an Infant of 15 to make a *197.*
Feoffment, yet his Release is void: But it
is not applied to the Custom of this County.

Nor is a Lease and Release warranted
by this Custom of *Kent.* *Obiter,* 21

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Ed. 4. 24. Bro. Custom, 50. Indeed it is said in *11 H. 4. 33. Bro. Custom, 15. Fitzh. Custom, 11.* that tho' the Custom does not extend to a Release to a Disseisor, because it is no Feoffment, but enures by way of Extinguishment of the Right, yet it does to a Lease for Years and a Release, for that amounts to a Feoffment, because the Freehold passes by the Release.

But on the other Hand it is to be considered, that according to the more modern Opinions at least, the Custom requires the Ceremony of a Livery *propriis manibus*, which is a publick Solemnity wanting in this latter Conveyance. And tho' it be said in our Books, that a Lease for Years, and Release in Fee, are tantamount to a Feoffment, yet no more seems to be meant by this, than that they give as large an Estate; for if a Man in his former Plea pleads a Feoffment in Fee, he shall not maintain it in his second Plea by a Lease and Release, but it will be a Departure. *Co. Lit. 304. a. 1 Ed. 4. 5.* And it is certain, that as to many Purposes a Lease and Release has not the Effect of a Feoffment; as to work Discontinuances, purge Disseisins, &c. And the Release of an Infant, operating by the Deed, may by the Common Law be avoided by any Person whatsoever; but the Feoffment taking Effect by the Livery, is, if executed with his own Hand, good, without the Assistance of a Custom, against all Persons but Privies in Blood. *8 Rep. 43. Whittingham's Case.* So that this Custom, which on all Hands is agreed to be taken strictly,

strictly, must receive a considerable Extension, before it can comprehend this other Conveyance.

And it seems still more difficult to extend the Custom to a Bargain and Sale for a Year, operating by the Statute of *Uses* made within Time of Memory, and a Release founded thereon, than to a Lease at Common Law executed by Entry, and a Release.

But when I contend, that this customary Power of Alienation is confined to *Feoffments*, I would be understood to consider the Infant as in actual Possession and Seisin of the Land; for otherwise (as I take it) the Custom will warrant him at the Age of 15 to release his Right in the Lands to him in Possession of the Freehold; and the modern Notion to the contrary may possibly appear, on Examination, to have no better a Foundation, than the single Opinion of Justice *Hankford*, in 11 H. 4. 33. which, as it was disregarded in the very Case, so it was grounded on a Misrepresentation (as it seems) of the Record of 55 H. 3. before cited, arising from a Slip of the Judge's Memory. The Year-Book Case is in Effect no other than this: Ante 194.

In a Writ of Entry *sur cui in vitâ*, as Son and Heir of *Margery*, who was Daughter and Heir of *Margery*, of whose Possession, &c. the Counsel for the Tenant pleads in Bar, that the Lands are Gavelkind; and that the Mother of the Demandant, through whom the Descent was made, released to the Tenant all her Right with Warranty, when she was of the Age of 15; and offers to aver, that the Usage is, that they may at that Age alien

lien by Feoffment, and likewise *release their Right*. But *Hankford* Justice says, you shall not take so large an Averment, for the Usage is of Record in the Time of King *Henry* (to which the Reporter adds a *Quere* what Record he meant; but I have already shewn how the Custom is recorded in the Time of that King) and shall be taken *ex stricto jure*; and the Usage is, that he may make a Feoffment, without other Alienation: But if he makes a Feoffment with Warranty, at such Age, he shall not be bound by the Warranty, for that the Usage does not extend to that; and if I am disseised, and I release, this is not my Feoffment, but a Lease for Years and a Release is a good Feoffment: Then here, when the Right of the Feme was discontinued, and an Action descends to the Heir, tho' the Heir releases, this is not a Feoffment, but an Extinguishment of the Right of Action; and she could not extinguish her Action while she was within Age. But notwithstanding this, it is remarkable that *Norton*, of Counsel with the Demandant, (being possibly better instructed of the Custom) durst not demur to the Plea, tho' urged to it by *Thurling, Ch. J.* but passed over, and replied, that the Release was made in the Time of the Grandmother, before any Right accrued to the Mother; and the Counsel for the Tenant being apprehensive of this, relied on the Warranty, &c. *Et sic pendet, &c.*

This Case upon the whole is rather an Authority, that the Custom warrants the Infant to release a Right; since it had otherwise been

been unnecessary to have pleaded that her Right accrued after such Release. Indeed, the Opinion of *Hankford* is partly followed by an *Obiter* Saying in 21 *Ed.* 4. 24. But neither in that, nor in any other of the printed Cases, was the Matter judicially before the Court. And if we have Recourse, for the Decision of this Question, to the Voice of the Country, who are the proper Judges of the special Customs of Gavelkind, Words cannot be more exprefs to comprehend a Release, than those of the *whole County* above, in 55 *H.* 3. To which may be added the following Verdicts in the very Point.

The first is *Peter de Merdale's* Case, in *Itin. Kanc.* 6 *Ed.* 2. *Rot.* 17. The whole Record whereof is inserted above, pag. 143. Where the Demandant being seised of one Moiety of the Gavelkind Inheritance of his late Wife, as Tenant by the Curtesy, and of other Moiety, as Guardian to his two Sons *William* and *Roger*, the Jury find, ' Quod postea prædicto *Will'o* filio
' *Petri* ætatis quindecim annorum existente,
' quando idem *Will'us* fuit plenæ ætatis secundum Consuetudinem de Gavelkynde, scil. post
' quintum decimum annum completum, per quod-
' dam scriptum confectum apud *London* concessit & dimisit prædicto *Petro* omnes terras & tenementa cum pertinentiis, quæ
' habuit sive habere potuit in villis prædictis per successionem hæreditariam de prædicta *Agnete* matre ipsius *Will'i*, tenendum
' eidem *Petro* ad terminum vitæ ipsius *Petri*; prædictis tenementis, unde Assisa ista

Verdict finding the Release of Infant at 15 by the Custom of Gavelkynd.

' ar-

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arrainata est; in seisinâ prædicti Petri existentibus : Qui quidem Willus postea rediens ad prædicta tenementa factum suum prædictum patriæ notificavit & ratum habuit, &c. And thereupon Judgment is given against William for his Purparty, tho' Peter's Title to one Moiety as Guardian was then at an End; and as to the other, he had incurred a Forfeiture by Marriage.

Nuper obiit.

The next is *De Gatewyk's Case*, Mich. 9 Ed. 2. C. B. Rot. 240. Kanc. A Nuper obiit brought by Richard and William de Gatewyk against Katharine de Gatewyk, &c. The Pleadings, as to the Purparty of William, are already inserted at Length, pag. 56. As to the Purparty of Richard, they are as follow :

Bar, that the Demandant released all his Right of Parcenary.

Katharina & aliæ, per Adam de Byrom Custodem suum, veniunt, & defendunt Jus suum quando, &c. & quoad propartem, quam prædictus Richardus filius Richardi clamat, &c. dicunt, quòd idem Richardus nihil Juris clamare potest in prædictis tenementis, quia dicunt, quòd prædictis tenementis, simul cum aliis tenementis in diversis villis in eodem Comitatu, in seisinâ prædicti Johannis de Gatewyk, patris ipsarum Katherine & aliarum, existentibus, idem Richardus per scriptum suum concessit, remisit, & omnino pro se & hæredibus suis imperpetuum quietum clamavit prædicto Johanni totum jus & clameum, quod habuit, vel aliquo modo habere potuit, ratione parcenariæ vel communis successionis post decessum Richardi de Gatewyk, Patris prædicti

‘ *Johannis*, in omnibus terris, tenementis, messuagiis, redditibus, boscis, pratis, pasturis, molendinis, vivariis, cum omnibus eorum pertinentiis, quæ quondam fuerunt dicti *Ricardi de Gatewayk*, patris prædicti *Johannis*, in *Esseche*, *Hertlighe*, *Derteford*, *Otteford*, *Sevenok*, *Kemesinge*, *Sele*, *Kyngsdowne*, & *Mapeleschaump*, habendum & tenendum omnia prædicta tenementa, &c. prædicto *Johanni* & hæredibus suis de capitalibus Dominis feodi imperpetuum, &c. & proferunt scriptum illud quod hoc testatur, unde petunt judicium, &c.

‘ Et prædictus *Ricardus*, quoad prædictum Demandant scriptum quietæ clamantiæ, bene cognoscit replies, that scriptum illud esse factum suum, sed dicit, he was under quod ipse prætextu scripti illius ab actione Age at the præcludi non debet, quia dicit, quod ipse Time of the tempore confectionis prædicti scripti fuit Release. infra ætatem; & hoc paratus est verificare, &c.

‘ Et *Katherina* & aliæ dicunt, quod præ-Tenants re- dictus *Ricardus* secundum Consuetudinem join the Cu- *Kancie* fuit plenæ ætatis tempore confec- stom of Kent, tionis prædicti scripti; dicunt enim, quod to be of full Consuetudo in partibus illis talis est, quod Age at 15 as to aliening Hæres de Tenurâ de Gavelkynde, cum Gavelkind complevit quintum decimum ætatis suæ Lands, and annum, est plenæ ætatis secundum consue- releasing his tudinem illam ad tenementa sua alienanda, Right; & jus suum quietè clamandum, &c. & and that the dicunt, quod prædictus *Ricardus* tempore Demandant confectionis ejusdem scripti fuit quindecim was 15 when annorum & amplius; & hoc paratæ sunt he released. verificare, &c.

Of Alienation by an Infant.

Book II.

The Deman-
dant takes If-
sue on the
Custom.

‘ Et *Ricardus* dicit, quòd Consuetudo,
quam prædicta *Katherina* & aliæ allegant,
non est talis in partibus prædictis; dicit
enim, quod ad hoc, quòd alienatio five
quietè clamancia alicujus de tenementis,
quæ sunt de tenurâ de *Gavelykynde*, ipsum
præcludere debent, requiritur quòd ipse
tempore alienationis seu quietè clamancie
hujusmodi sit ætatis viginti & unius anno-
rum plenè completorum, & non infra
ætatem illam, viz. statim post quintum
decimum annum completum, sicut prædicta
Katherina & aliæ dicunt; & hoc petit
quòd inquiretur per patriam, &c. Et *Ka-
therina* & aliæ similiter.

Verdict that
one of the
Age of 15
may give and
release Gavel-
kind Lands,
and that the
Demandant
released at
that Age.

‘ Postea *Juratores*, de consensu partium
electi, venerunt, & dicunt super sacramen-
tum suum, quòd prædictus *Ricardus* tem-
pore Confectionis prædicti scripti quietè-
clamancie, quod prædictæ *Katherina*,
Marg. & *Eliz.* proferunt sub nomine ip-
sius *Ricardi*, fuit ætatis quindecim anno-
rum & amplius, & quòd *Quilibet ætatis
quindecim annorum de tenurâ de Gavelykynde
potest tenementa sua dare, Et quietè-claman-
tiam imperpetuum inde facere, secundum con-
suetudinem tenuræ illius, &c.*

Judgment ac-
cordingly for
the Tenants.

‘ Ideò *Consideratum* est, quòd prædictus
Ricardus, quoad propartem suam ipsum
contingentem de tenementis prædictis, nil
capiat per Juratam istam, sed sit in mîa
pro falso clamore, &c.

‘ * *Plac.*

* * *Plac. Ass. in Com. Kanc. 47 Ed. 3.* Chap. III.

* *Affisa venit recognitura si Johannes Wisdom*
 * *& Isabella Uxor ejus injustè & sine judicio*
 * *disseisiverunt Simonem Parlebien de libero*
 * *tenemento suo in Ketebrok & Elibam post*
 * *primam, &c. Et unde queruntur de duo-*
 * *decim acris terræ, & dimidio acræ prati*
 * *cum pertinentiis, &c.*

Affize.

* *Et Johannes & Isabella in propriis per-*
 * *sonis suis veniunt, & respondent ut tenentes*
 * *tenementorum prædictorum, & dicunt,*
 * *quod prædictus Simon Affisam inde versus*
 * *eos habere non debet, quia dicunt, quòd*
 * *idem Simon per quoddam scriptum suum,*
 * *quod proferunt hîc in Curiâ, cujus data est*
 * *die Lunæ prox. post festum Purificationis*
 * *Beatæ Mariæ anno Regni Regis nunc*
 * *Angliæ 35^o. remisit & quietum clamavit*
 * *eidem Johanni Wisdom totum jus suum,*
 * *quod habuit in tenementis prædictis; &*
 * *petunt judicium si idem Simon Affisam in-*
 * *de versus eos contra scriptum suum præ-*
 * *dictum habere debeat, &c.*

*The Tenants
plead the Re-
lease of the
Plaintiff,*

* *Et prædictus Simon, non cognoscendo*
 * *scriptum prædictum, dicit quod ipse ab*
 * *Affisâ in hâc parte habendâ excludi non*
 * *debet, quia dicit, quòd ipse tempore con-*
 * *fectionis scripti prædicti fuit infra æta-*
 * *tem, &c. & hoc petit quòd inquiratur*
 * *per Affisam, &c.*

*Who replies,
that he was
under Age at
the Time.*

D d 2

Et

* *N. B.* The Rolls of the Records before the Justices of Affize are seldom numbred, but the Bundles are generally small.

Of Alienation by an Infant.

Book II.
 Tenants re-
 join, that the
 Plaintiff was
 15, and by
 the Custom of
 Gavelkind
 may release at
 that Age.

Plaintiff sur-
 rejoins, that
 he was under
 15.

Verdict, that
 he was up-
 wards of 15.

Judgment for
 the Tenants.

Assize.

‘ Et prædicti *Johannes & Isabella* dicunt,
 quòd tenementa prædicta sunt *Gavelkynden-*
sia, & dicunt, quòd *usus Gavelkynd talis est,*
 quòd *quilibet homo ætatis quindecim annorum*
poteſt terras & tenementa ſua dare & alie-
nare, remittere & relaxare cuicumq; volue-
rit, a toto tempore in Com. Kanc. uſita-
tus. Et dicunt, quod tempore confeſtionis
 ſcripti prædicti dictus *Simon* fuit ætatis
 quindecim annorum, ita quòd tunc re-
 mittere & relaxare potuit jus ſuum de
 tenementis prædictis in formâ prædictâ;
 & hoc parati ſunt verificare per *Aſſiſam,*
 &c.

‘ Et prædictus *Simon* dicit, quòd ipſe,
 tempore confeſtionis ſcripti prædicti, non
 fuit ætatis quindecim annorum; & hoc
 paratus eſt verificare per *Aſſiſam,* &c.
 ‘ Et prædicti *Johannes & Isabella* ſimiliter,
 ‘ Ideò capiatur inde inter eos *Aſſiſa,* &c.

‘ *Recognitores* veniunt, qui ex conſenſu
 partium ad hoc electi & jurati dicunt ſuper
 ſacramentum ſuum, quod prædictus *Simon*
 tempore confeſtionis ſcripti prædicti fuit
 ætatis quindecim annorum, & amplius. Ideo
 ‘ *Conſideratum* eſt quod prædictus *Simon*
 nichil capiat per *Aſſiſam* iſtam, ſed ſit in
 mīa pro falſo clamore ſuo, &c. Et præ-
 dicti *Johannes & Isabella* inde ſine die.

Aſſ. in Com. Kanc. 7 Ed. 3. Rot. 2.
 An *Aſſize* brought before former Juſtices
 of *Aſſize*, by *Richard de Bourne* and *Joan*
 his Wife, againſt *John*, Son of *Thomas de*
Hegbam and others, for a large Quantity
 of Lands in *Littlebourne, Stoddemershe, Chis-*
celet,

celet, Reculvre, & Menstre in insulâ de Taneto. Chap. III.

John de Hegham pleads, - ' *Quòd tene-menta sunt de tenurâ de Gavelkynde, & dicit quod prædictus Thomas pater suus obiit seifitus de eisdem tenementis in domino suo, ut de Feodo & jure; post cuius mortem prædicta Johanna, quæ nunc queritur simul, &c. ut ipsa, quæ fuit uxor prædicti Thomæ, post mortem ipsius Thomæ seifivit prædicta tenementa, secundum Usam de Gavelkynde, ratione Nutrituræ ipsius Johannis filii & hæredis ipsius Thomæ, & ea optinuit per Usagium prædictum, usq; ad ætatem prædicti Johannis filii Thomæ quindecim annorum; post quod tempus idem Johannes filius Thomæ, ut ipse qui plenæ ætatis fuit per Usagium prædictum, intravit prædicta tenementa ut hæreditatem suam; & sic tenet ipse tenementa illa; & petit judicium, si prædicti Ricardus & Johanna de hujusmodi possessione prædictæ Johanne, ratione nutrituræ prædictæ, ut prædicitur, Assisam, &c.*

Bar, that the Tenant's Father died seised, and his Mother was afterwards seised of the Lands as Guardian in Gavelkind, and the Tenant entred on her at 15.

' *Et prædicti Ricardus & Johanna non deducunt quin eadem Johanna habuit Nutrituram prædicti Johannis filii Thomæ, seu quin tenuit prædicta tenementa ratione Nutrituræ per usagium, sicut prædictum est, sed dicunt, quòd ipsi eâ de causâ ab assisâ suâ repelli non debent, dicunt enim, quòd prædictis tenementis in * seisinâ ejusdem*

Plaintiffs reply a Release by the Tenant at 15 to his Mother, the Lands being Gavelkind.

* If a Guardian, after the full Age of the Heir, continues in Possession against the Will of the Heir, the

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dem Johannæ existentibus, prædictus Johannes filius Thomæ, post ætatem suam quindecim annorum, ut ille, qui plenæ ætatis fuit secundum usum de Gavelkynde, remisit, dimisit, & relaxavit eidem Johannæ totum Jus & Clameum suum, quod habuit in eisdem Tenementis; & proferunt inde quoddam scriptum hic in Curiâ sub nomine prædicti Jobannis filii Thomæ, quod idem testatur in hæc verba: Universis scriptum hoc visuris, vel audituris, Johannes filius Thomæ de Hegbam Salutem in Domino sempiternam. Noveritis me in purâ & legitimâ ætate dimisisse, concessisse, & imperpetuum quietum-clamasse, pro me & hæredibus meis, Johanne de Hegbam matris meæ, & hæredibus suis, totum Jus meum & Clameum, quod habui, vel aliquo modo habere potero in futuro, in omnibus & singulis tenementis meis ubicunq; in Com. Kanc. existentibus, &c.

The Tenant rejoins, that he was under 15 at the Time of the Release.

Et prædictus Johannes filius Thomæ non dedit prædictum esse factum suum, sed dicit, quod scriptum illud ei nocere non debet, dicit enim, quod tempore confectionis scripti illius fuit infra ætatem quindecim annorum; & de hoc se ponit super patriam, & prædicti Ricardus & Johanna similiter, &c.

Which Plea is an Admission of the Custom. And this Record being sent down to the present

the Law looks upon him as an Abator, *Co. Lit.* 57. b. if with the Consent of the Heir, he is Tenant at Will: In either Case he is capable of accepting a Release; in the first, because he has a Freehold; in the second, by Reason of the Privy.

sent Justices of Assize, ' Coram præfatis Chap. III.
 ' Justiciariis prædicti Ricardus & Johanna
 ' uxor ejus veniunt, & prædictus Johannes
 ' filius Thomæ non venit ad manutenendum
 ' placitum, quod aliàs placitavit, &c. sed
 ' Willus de Waure respondet pro eo, quàm
 ' pro aliis, tanquam eorum Ballivus, & di- And after-
 ' cit, quòd nullam injuriam inde fecerunt wards re-
 ' seu disseisinam, & de hoc se ponunt super pleads Null
 ' Assisam, &c.' And the Jury find for the Disseisin, &c.
 Plaintiffs; which, it seems, they could not Verdict,
 have done, had not the Right passed from
 the Tenant to the Plaintiff Joan by this Re-
 lease; for otherwise the Tenant's Entry had
 been lawful, and no Disseisin. And on and Judgment
 that Verdict there is Judgment for the for the Plain-
 Plaintiffs.

Ass. in Com. Kanc. 2 Ric. 2. Assisa Assize.
 ' venit recognitura si Johannes Marchall de
 ' Roucestre, & Johanna Uxor ejus, injustè,
 ' &c. disseisiverunt Alianoram Spicer de
 ' Roucestre de libero tenemento suo in
 ' Roucestre, post primam, &c. Et unde
 ' queritur, quòd disseisiverunt eam de duo-
 ' bus Messuagiis cum pertinentiis, &c.

' Et prædicti Johannes & Johanna in pro-The Tenants
 ' priis personis suis veniunt, & respondent plead in Bar,
 ' ut tenentes tenementorum in visu posito- a Release by
 ' rum, & dicunt, quòd Assisa inde inter the Plaintiff at
 ' eos fieri non debet, quia dicunt, quod tene- her Age of
 ' mentis prædictis, quæ sunt de tenurâ de Ga- 15, the Te-
 ' velkynd, in seisinâ ipsius Johannæ, dum nements being
 ' sola fuit, existentibus, præfata Alianora Gavelkind.
 ' plenæ ætatis existens secundum Consuetudinem
 ' de Gavelkynd, viz. de ætate quindecim an-
 ' norum & amplius, per quoddam scriptum
 ' suum,

suum, quod hic in Curiâ proferunt, cuius
 data est apud Rouchestre, &c. per nomen
 Alianoræ, filię Roberti Spicer de Rouche-
 stre, remisit, relaxavit, & omnino de se
 & hæredibus suis imperpetuum quietum-cla-
 mavit eidem Johanne, per nomen Johanne,
 quæ fuit uxor Roberti Spicer patris ipsius
 Alianoræ, & hæredibus suis totum Jus &
 Clameum, quæ habuit in Messuagiis præ-
 dictis, per nomina duorum messuagiorum,
 situatorum in Civitate Roffensi, unde
 unum Messuagium, vocatum Swan atte
 Hope, situatur inter Messuagium Johannis
 de Barton versus East, & Messuagium
 Benedicti Ryx versus West; & aliud Mes-
 suagium situm est inter Messuagium quon-
 dam Emmæ Godwyne versus East, & Mes-
 suagium Roberti Bridbrok versus West, &
 prædictum Messuagium vocatur Cbeker
 atte Hope; & ulterius obligavit se, & hæ-
 redes suos, ad Warrantizandum eidem Jo-
 hanne, hæredibus & assignatis suis, mes-
 suagia prædicta cum pertinentiis imperpe-
 tuum; unde petunt iudicium, si eadem
 Alianora contra scriptum suum prædictum,
 & quod Warrantiam in se continet, Af-
 fisam de tenementis prædictis versus eos
 habere seu manutenere debeat, &c.

Plaintiff re-
 plies, that the
 Release was
 made through
 Durels of Im-
 prisonment,
 &c.

Et prædicta Alianora dicit, quod ipsa
 virtute scripti prædicti, seu Warrantie in
 eadem contentæ, ab Affisâ de tenementis
 prædictis habendâ præcludi non debet;
 quia dicit, quod tempore confectio-
 nis scripti illius ipsa fuit imprisonata in quâ-
 dam Camerâ in Villâ prædictâ per præ-
 dictam Johannam, & in eadem detenta,

& ulterius eadem *Johanna* ipsi *Alianora* Chap. III.
 comminata fuit, quod non comederet, nec
 biberet, nec exiret abinde, donec eidem
Johannæ concedere vellet ad faciendum &
 sigillandum scriptum prædictum; & sic
 dicit, quod ipsa per hujusmodi duritiam,
 imprisonamentum, metum minarum præ-
 dictarum, ac coercionem, fecit eidem
Johannæ scriptum prædictum; & hoc pa-
 rata est verificare, unde petit judicium,
 &c.

Et prædicti *Johannes* & *Johanna* di- Issue joined on
 cunt, quod tempore confectionis scripti the Duresis.
 prædicti præfata *Alianora* fuit sui juris ad
 largum, & extra quamlibet prisonam, &
 scriptum illud ex mera & spontaneâ volun-
 tate suâ fecit, & non per duritiam impri-
 sonamenti, metum minarum, aut per co-
 hercionem; & de hoc se ponunt super Af-
 fissam, & prædicta *Alianora* similiter. Ideo
 capiatur inde Affisa.

Recognitores veniunt, qui de consensu Verdict, that
 prædictorum *Alianoræ*, *Johannis* & *Johannæ* she was at
 ad hoc electi, triati, & jurati dicunt super large, &c.
 sacramentum suum, quod tempore con-
 fectionis scripti prædicti præfata *Alianora*
 fuit sui Juris, ad largum, & extra quam-
 libet prisonam, & scriptum illud ex merâ
 & spontaneâ voluntate suâ fecit, prout
 prædicti *Johannes* & *Johanna* placitando
 allegaverunt, & non per duritiam impri-
 sonamenti, metum minarum, seu per co-
 hercionem, prout prædicta *Alianora* asse-
 ruit. Ideo Consideratum est quod eadem Judgment for
Alianora nihil capiat per Affissam istam, the Tenants.

E c

sed

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sed fit in mia pro falso clamore suo, &
 prædicti *Johannes & Johanna* eant inde sine
 die, &c.

Verdict find-
 ing the Re-
 lease of the
 Heir in Ga-
 velkind,

Ass. in Com. Kanc. 4 Ric. 2. in iisd. Rot.
 An Affise brought by *Henry Aleyn* and *Agnes*
 his Wife, against *William de Echynghamme*
 Knight, and others, for Lands in *Cranebroke*.
 On *Nul Disseisin* pleaded, the Jury find
 specially (amongst other Things) that,
 prædictis *Henrico & Agnete* in seisinâ me-
 dietatis messuagii & terræ existentibus,
 &c. *Quidam Galfridus Nettare* filius *Gal-*
fridi Nettare, per quoddam scriptum su-
 um, iisdem Recognitoribus in evidentiam
 liberatum, (quod sequitur in hæc verba,
 Noverint universi per præsentem me *Galfri-*
dum Nettare, filium *Galfridi Nettare* de pa-
 rochiâ de *Cranebroke*, concessisse, relaxasse &
 imperpetuum pro me & hæredibus meis
 quietum-clamasse *Henrico Aleyn*, & *Agneti*
 uxori ejus, de eâdem Parochiâ, totum Jus
 & clameum, quod habeo, seu de cætero
 habere potero, in medietate cujusdam mes-
 suagii cum suis pertinentiis, unâ cum me-
 dietate de duabus peciis terræ cum suis perti-
 nentiis; quam quidem medietatem prædicti
 messuagii, unâ cum medietate dictarum pe-
 ciarum terræ, prædicta *Agnes* habuit ex do-
 no prædicti *Galfridi* patris mei, & dictum
 messuagium cum pertinentiis scituatum est,
 &c.) concessit & [remisit] imperpetuum præ-
 fato *Henrico*, & *Agneti*, & eorum hære-
 dibus

* The Roll is obliterated in this Place.

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'dibus & assignatis, totum Jus & Clameum, Chap. III.
 'quæ habuit in prædictâ medietate * [Messua-
 'gii] & terræ prædictorum, &c. in seisinâ
 'eorundem Henrici & Agnetis adtunc ex-
 'istente. Recognitores quæsitî si terra præ-
 'dicta sit de tenurâ de Gavelkynde, necne,
 ' & cujus ætatis præfatus Galfridus filius
 ' Galfridi existit tempore confectionis scripti
 ' prædicti, præfatis Henrico & Agneti facti,
 ' &c. dicunt super sacramentum suum, quod
 ' prædicta [* terra est de] tenurâ de Gavel-
 ' kynde, & quod tempore confectionis scripti
 ' prædicti præfatus Galfridus filius Galfridi
 ' fuit circiter ætatem decem & septem anno- When about
 ' rum, &c.' And Judgment is given for the Judgment a-
 Plaintiffs Henry and Agnes for that Moiety. gainst the
 Heir.

Aff. in Com. Kanc. 4 Ric. 2. An Affise of
Novel Disseisin, brought by John de Twytham
and Maud his Wife against John Faversham In Affize.
and Sarah his Wife, for Lands in Noning-
ton, &c.

The Tenants, as to Part of the Premisses, Release of an
 plead, that 'Ricardus Kempe de Brabourne, Infant at 15
 ' &c. dedit Jobanni Akbolt & Sara, tenendum of Gavelkind
 ' eis & hæredibus prædicti Jobannis Akbolt Lands plead-
 ' imperpetuum; & de ipsis Jobanne Akbolt & ed.
 ' Sara exivit quidam Edwardus Akbolt, ut
 ' filius & hæres eorundem, & postea præ-
 ' dictus Johannes Akbolt obiit, post cujus
 ' mortem tenementis prædictis in seisinâ præ-
 ' fate Saræ existentibus, præfatus Edwardus,
 ' filius & hæres ejusdem Johannis Akholt, de
 ' ætate quindecim annorum & amplius, per
 E e 2 ' quod-

* The Roll is obliterated in these Places.

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‘ quoddam scriptum suum, quod hinc in Curia proferunt, remisit & relaxavit eidem Saræ, & hæredibus ac assignatis suis imperpetuum, totum Jus & Clameum, quæ habuit in omnibus tenementis prædictis; quæ quidem tenementa sunt de tenurâ de Gavelkynde; quæ quidem Sara cepit in virum ipsum Johannem Faversham, &c.’ And neither the Release nor the Custom are denied by the Plaintiffs.

Affize.

Aff. in Com. Kanc. 4. Ric. 2. An Affize brought by *John Croke* and *Dionise* his Wife, against *John Bolle* and *Alice* his Wife, for Lands in *Sesaltre*.

The Tenants plead, that *Nicholas de Clyndene*, Father of the Plaintiff *Dionise*, being seised in Fee, devised them, according to the Custom of the Borough, to his Wife *Alice* for Life, who afterwards married

Plea of Release and Confirmation by the Plaintiff at 15, by the Custom of Gavelkind.

Bolle; ‘ Et postea tenementis illis sic in seisatione eorundem *Johannis Bolle* & *Alicie* existentibus, præfata *Dionisia* de ætate quindecim annorum & amplius existens, per nomen *Dionisæ*, &c. per quandam cartam suam, quam hinc in Curia proferunt, &c. concessit & confirmavit eidem *Johanni Bolle* & *Alicie* uxori, & eorum hæredibus ac assignatis, omnia prædicta tenementa cum pertinentiis imperpetuum, per nomen, &c. quæ omnia tenementa sunt de tenurâ de Gavelkynde; & ulterius obligavit se & hæredes suos ad *Warrantiam*, &c.’ and therefore pray Judgment *si contra scriptum suum*, &c.

The Plaintiffs reply, ‘ Quod ipsa *Dionisia* est infra ætatem, per quod ipsi cartam illam

illam cognoscere vel dedicere, vel ad
illam respondere non possunt, nec per le-
gem terræ compelli debeant, & petunt
Assisam: Et pro eo quòd eadem *Dionisia*
infra ætatem est, the Assise is awarded to
be taken at large; Et præceptum est Vic.
quod venire faciat coram præfatis Justici-
ariis *Thomam Spriget*, &c. testes in præ-
dictâ cartâ nominatos, ad recognoscendum
simul, &c. Which shews, that the Court
looked upon the Execution of the Deed to be
the Matter in Dispute.

Ass. in Com. Kanc. 12 Ric. 2. An Assise of
Novel Disseisin, by *Thomas de Wormesell*, *Ro-*
bert Brockman, and others, against *John Kel-* Assize.
sham, for Lands in *Newenton* near *Sydyng-*
bourne.

The Tenant pleads in Bar, that the Te-
nements 'sunt de Tenurâ de *Gavelkynde*; &
'dicit, quod habetur ibidem talis Consue-
'tudo, quòd quilibet tenens aliquorum tene-
'mentorū, quæ sunt de tenurâ de *Gavel-*
'kynde, tenementa illa, cum fuerit ætatis *vel-*
'quindecim annorum, dare possit & alienare, *lien and re-*
'& totum jus suum remittere & relaxare ad *lease, &c.*
'voluntatem suam, juxta Consuetudinem
'Comitatûs prædicti; and that one *Thomas*
de Wornedale being seised in Fee of the Pre-
misses, & infra ætatem quindecim annorum,
made a Feoffment in Fee thereof to one
Adam Elys, and afterwards died, leaving one
Maud his Sister and Heir, (under whom the
Plaintiffs claim) who being 'ætatis quindecim
'annorum & amplius, viz. ætatis de-
'cem & septem annorum, per nomen *Ma-*
'tilda

Plea of the
Custom of *Ga-*
velkind to a-
lien and re-
lease, &c.

and of a Re-
lease of the
Lands,
when above
15, to one
having before
a defeasible
Estate under
the Feoffment
of an Infant
under 15.

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Matilda filia Richardi de Wornedale, per quoddam scriptum suum, quod hic in Curia profert, cujus data est, &c. remisit & relaxavit, & omnino de se & hæredibus suis imperpetuum quietum clamavit præfato Ade & ipsi Johanni Kelsbam totum Jus suum & Clameum, quæ habuit, vel aliquo modo habere potuit in tenementis prædictis cum pertinentiis, &c. prædicto Johanne Kelsbam in possessione prædictorum tenementorum adtunc existente, &c.

Reply Non est factum.

The Plaintiffs reply, that the Release non est factum prædictæ Matildæ: Which puts in Issue neither the Custom, nor the Infancy, but the Execution of the Deed only. And upon this Issue was joined, &c.

Affize.

Aff. in Com. Kanc. 13 Ric. 2. An Affise brought by Peter Hamon, and Isabel his Wife, against John Wardon the Elder, for Lands in Egerton, &c.

Plea of Custom of Gavelkind for Women at 15 to alien, &c.

The Tenant pleads in Bar, 'Quod tenementa in visu posita tenentur secundum Consuetudinem de Gavelkynd; & dicit quod per Consuetudinem de Gavelkynd Mulieres, quæ sunt inde tenentes, cum ætatis quindecim annorum fuerint, tenementa illa alienare possunt; & dicit quod prædicta Isabella, per nomen Isabellæ Brestcombe, dum sola fuit, & ætatis quindecim annorum & amplius, per quoddam scriptum suum, quod hic in Curia profert, &c. cujus data est, &c. remisit & relaxavit, & omnino de se & hæredibus suis imperpetuum quietum clamavit eidem Johanni Wardon seniori

Release by one of that Age.

‘ niori, per nomen *Johannis Wargedon*, &
 ‘ *Agneti* tunc uxori ejus, *adtunc tenentibus*
 ‘ *tenementorum prædictorum*, & hæredibus ip-
 ‘ *fius Johannis Wardon senioris*, totum *Jus* &
 ‘ *Clameum*, quod habuit, seu quovismodo ha-
 ‘ bere potuit in tenementis prædictis, per
 ‘ nomen omnium terrarum & tenemento-
 ‘ rum, quæ quondam fuerunt *Rogert de*
 ‘ *Brestcombe* patris sui, & obligavit se & hæ-
 ‘ redes suos ad *Warrantiam*, &c. unde pe-
 ‘ tit Judicium, &c.* The Plaintiffs reply
 non est factum, and at the Day of Trial are
 Nonfuit.

Tho^s these Authorities may be sufficient Whether the
 to prove, that the Custom has been an- Custom ex-
 ciently so understood, that an Infant of 15 tends to other
 may release the Fee to his Guardian hold- Conveyances.
 ing over, or to Tenant for Life, or a mere
 Right to one that has a defeasible Estate,
 who have Seisin already; yet it is a Question
 of a very different Consideration, whether
 he may grant a present Estate in the Land
 by any other Means, than that of Livery:
 None of these Instances amount to this; and
 the only Cases, that favour such an Opi-
 nion, are those already mentioned, which
 speak in general Terms of the Custom, as
 giving Power to *alien*; and such others as
 say, that the Infant is by the Custom of Ga-
 velkind of * *full Age* at 15: To which may
 be

* Note, That the *full Age* of Male and Female,
 according to common Parlance, is the Age of 21 Years.
 Litt. Sect. 104.

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Book II. be added the usual Manner of pleading the general Issue in a *Dum fuit infra etatem* for Gavelkind Lands :

Itin. Kanc. 55 H. 3. Rot. 90. in dorso. Dum fuit infra etatem, by William Peterfon, against Philip de Knolle, who pleads, that the Demandant ' fuit plenæ ætatis quando dimisit, scil. ætatis quindecim annorum secundum Consuetudinem Gavelikindorum. Juratores dicunt, &c. quod prædictus Will'us ' fuit plenæ ætatis quindecim annorum secundum ' Consuetudinem de Gavelikinde, quando dimisit, &c.' And the like Pleading occurs in *Eod. Itin. Rot. 14 & 25. Itin. Kanc. 7 Ed. 1. Rot. 47. Rex Roll. Trin. 12 Ed. 1. C. B. Rot. 68. Itin. Kanc. 21 Ed. 1. Berewicke Rot. 4. Itin. Kanc. 6 Ed. 2. Rot. 3.* This general Method of pleading, that he being of full Age, &c. conveyed, without specifying the Kind of Conveyance, is some sort of Evidence, that the Custom extends to all Manner of Alienations.

But as this Custom is not of a Kind to be favoured or extended, and a Feoffment was the Conveyance most used at Common Law, and being the most publick and notorious Method of Alienation, is fittest in the Case of an Infant, where there may be Suspicion of Fraud or Imposition; I believe no prudent Person would advise to try the Experiment of any other Conveyance, where a Feoffment may possibly be had.

Whether a
Warranty on
a Feoffment
within the Custom be good.

A Warranty on a Feoffment within the Custom is said to be void, the Custom not

extending

extending to it. 11 H. 4. 33. But see before, 198, 212, 214. Chap. III.

2. It is said in some of the Books, that the Custom warrants no Alienation, but upon a Sale. 21 Ed. 4. 24. Old Bendl. 7. New Bendl. 33. by Hales Serjeant. For a full and sufficient Recompence. Lamb. ⁶²⁶₃₈₄, ⁶²⁷₃₈₅, 566. Noy's Max. 40. For the Words of the *Custumal* are *doner & vender*, Lamb. *ibid.* And those of 55 H. 3. Rot. 5. Ante 194. are *da-re, vendere*. But the other two Copies of the *Custumal* read *doner ou vender* in the Disjunctive: Nor can I find any Instance on Record, wherein the Consideration for the Feoffment is set out, as probably it would be, were it necessary; but the common Way of pleading is, *quod dedit & concessit, &c.* or sometimes, *quod feoffavit, &c.* or *dimisit*, or *remisit & relaxavit*, as in the Instances before.

3. Some have said, that the Infant must have the Lands by Descent, and not by Purchase, for the Words of the *Custumal*, *Ceux Heirs*, do not include Purchasers. Lamb. ⁵²⁷₃₈₃, 566. O. Bendl. 7. N. Bendl. 33. by Hales Serjeant, who was a Kentish Man. So is the Language of Mich. 11 Ed. 3. B. R. Rot. 133. and Mich. 20 R. 2. B. R. Rot. 62. that *Hæredes de Gavelykynde possunt alienare, &c.* For this Reason, it is said, that the Custom extends not to empower him to alien Lands given him by Will. Noy's Max. 40. But the Conclusion is somewhat too hastily drawn; for the Words of other Records are more

F f general,

general, as that *Quilibet tenens*, &c. as in 55 H. 3. *Itin. Kanc. Rot. 5. Ante 194. Mich. 9 Ed. 2. C. B. Rot. 240. Ante 202. Ass. in Com. Kanc. 47 Ed. 3. Ante 204. & Ass. in Com. Kanc. 12 Ric. 2. Ante 213.* And likewise among the same Records of the same Year in *Mich. Pour's Case*, it is pleaded, ' *Quòd habetur* ' *Talis Consuetudo in Comitatu præ-* ' *dicto, quod quilibet tenens terrarum &* ' *tenementorum, quæ sunt de tenurâ de* ' *Gavelkynd, tenementa illa, cum ætatis* ' *quindecim annorum fuerit, in feodo alienare* ' *potest* ; and a Feoffment accordingly. And in *Trin. 12 Ed. 1. C. B. Rot. 68. Kanc.* In a *Dum fuit infra ætatem*, and Issue joined, whether the Plaintiff were of full Age ; the Jury find, *quod fuit quindecim annorum, quando dimisit, &c. Requisiti quantæ ætatis homo debet esse, qui tenet in Gavelikende, qui possit alium feoffare, per quod stabile sit Feoffamentum suum, dicunt quod quindecim annorum.*

The Infant cannot by Feoffment discontinue Lands entailed.

4. He must be seised in Fee. An Infant above the Age of fifteen Years made a Feoffment of Lands in Gavelkind whereof he was Tenant in Tail ; the Court held clearly, that this Feoffment is no Discontinuance, nor shall bind the Infant ; for the Custom shall never enable him to do a *Tort*, and therefore shall be taken to extend only to Land whereof he is seised in Fee. *Vaughan and Holdes, Cro. Jac. 80.*

It

It seems that an Infant may, within the Custom, make a Lease for Life or Gift in Tail by Livery *propria manu*: For a Custom to grant Lands in Fee-simple *à fortiori* extends to granting them for a lesser Estate. *Co. Copyb. Sect. 33. Co. Litt. 52. b. Cro. Eliz. 373.* Nay, if a Custom be to grant in Fee, & *non aliter*, yet he may grant for Life; or to *A.* for Life, Remainder to *B.* in Tail. *Salk. 189. per Holt.*

Chap. III.
Whether Gift in Tail, or for Life by Livery be within the Custom.

If an Infant of Fifteen, where there is a Custom for Persons of that Age to make a Feoffment, should grant to the King by Deed inrolled, and afterwards a Statute should be made confirming all Grants to the King before that Time, yet this Statute would not make it good; for where an Act is good by Custom, if that be not pursued, it is all one as if there were no Custom: And the Statute never meant to enable those Persons or their Grants, who by natural Defects or Disabilities were either by the Law of Nature or the Law of the Land disabled to grant. *Hob. 224, 225.*

Grant to the King by Deed inrolled.

In Affize the Tenant pleads in Bar the Feoffment of *J. S.* the Plaintiff replies, that *J. S.* at the Time of the Feoffment was under Age, &c. the Tenant rejoins, that there is a Custom in the Place, that any one of the Age of fifteen Years may make a Feoffment. And this was held no Departure, for the Force of the Bar is the Feoffment, and the Matter in the Rejoinder is to prove the Feoffment good, so that it is only an Inforcement of the Bar. *21 H. 7. 17. b.* And there is much the same Plead-

How this Feoffment may be pleaded.

Of Alienation by an Infant.

Book. II. ing, on the same Custom in 32 *Ass. pl. 4* and in *Mich. 9 Ed. 2. C. B. Rot. 240. Ante 200. & Plac. Ass. 47 Ed. 3. Simon Parlebien's Case, ante 203.* and no Exception taken to it. But however reasonable this Opinion may seem, the more adviseable Way is to set out the Custom in the first Instance; for it is laid down as a general Rule in *Co. Litt. 304. a*, that when a Man in his former Plea entitles himself generally by the Common Law, in his second Plea he shall not inable himself by a Custom, but should have pleaded it at first. And this is supported by 37 *H. 6. 5. a. Keilw. 75. b.* Abbot of *Bukefast's Case*, And *Yelv. 14. Wood and Hawkshead*, where the very Case before is put by the Court: If a Man intitles himself by Feoffment of one *A.* and the other shews that *A.* was an Infant at the Time of the Feoffment, if the Plaintiff introduce a Custom to make the Feoffment good, it is a Departure, for the Custom is a Matter of Title. But see *Godb. 122.* Covenant brought on an Indenture of Apprenticeship, the Apprentice pleaded Infancy, the Plaintiff replied the Custom of *London* for an Infant to bind himself Apprentice. *Wray Ch. Just.* held it no Departure. But this afterwards coming in Question in the Case of *Walker and Nicholson, Cro. Eliz. 652.* the Court doubted concerning it. And in the Case of *Mole and Wallis*, reported 1 *Lev. 81. Raym. 60. 1 Sid. 142. 1 Keb. 376, 469, 512.* the Court were divided in Opinion on the like Question,

Of Alienation by an Infant.

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Question, two Judges holding it a Departure, and Two that it was not. Chap. III.

Where an Infant, impleaded in a *Præcipe* Of Age. for Gavelkind Lands of his Ancestor, has prayed, that the Parol might demur till Twenty-one, it has often been endeavoured to oust him of his Age by Pleading that the Lands are Gavelkind, and the Infant above the Age of fifteen Years, and that the Custom is, that when the Heir is of the Age of Fifteen, he shall have his Lands, and may alien them, and therefore ought to answer immediately; but the Court has held this not to be a good Counterplea, for tho' by this Custom he is of Ability to alien his Land at that Age, yet he is under Age as to other Respects, and they must adjudge his Age according to the Law of the Land.

9 *Ed.* 3. 38. *Hill.* 31 *Ed.* 3. *Age* 53.
39 *Ed.* 3. 10. 11 *H.* 4. 29. 16 *Ed.* 2.
Mayn. 478. And the same Thing is affirmed in *Dyer* 263.

But as the first of these Authorities seems to acknowledge, that if it could be found, that the Usage had been otherwise allowed in this particular, it would vary the Case; I shall cite a Record to shew, that by the Custom of *Kent*, an Infant of fifteen Years is of Age as to this Purpose, as well as to that of Alienation.

Itin. Kanc. 39 *H.* 3. *Rot.* 1. in dorso. A Writ of Entry *sur Disseisin* brought by *Tho.* Son of *Thomas le Muner*, against *Thomas Edward*, and others, for the Moiety of a Mill, &c. in *Erchele*. * *Thomas Edward*
& venit

venit & visus est in Curiâ, & est infra ætatem; & quia prædicti *Thomas* & alii clamant tenere prædictum tenementum in Gavelikend, * **COMITATUS** *quæsitus* cuiusmodi ætatis homo respondere debeat ad huiusmodi tenementa, dicit, quod *quilibet ætatis quindecim annorum respondere debet ad huiusmodi tenementa, quæ tenentur in Gavelikend*, quodcunq; breve Domini Regis versus eum perquisitum fuerit, scil. tam ad Breve de Recto, quàm ad aliud; & non infra XV annos. Et quia idem *Thomas* nondum est ætatis quindecim annorum, Consideratum est quod prædicta loquela remaneat sine die usq; ad ætatem prædicti *Thomæ Edward*, &c.

And some further Weight is added to this Authority by *Itin. Kanc. 55 H. 3. Rot. 25 & 90. and Itin. Kanc. 6 Ed. 2. Rot. 17. Ante 199.* Where the Jury finding the customary Alienation introduce it by saying generally, that the Person *fuit plenæ ætatis secundum Consuetudinem de Gavelykynde, scil. quindecim annorum, &c.*

Vide Leg. 70. H. 1. Ante 185. And indeed we may collect from *Bracton*, that this is little else than the Remains of the old Common Law; for he having said, that *sunt diversæ ætates secundum diversitatem hereditatum & tenementorum; De Feodo verò militari, habebit hæres plenam ætatem cum 21 annum impleverit, & 22 attigerit; si verò fuerit hæres & filius Sockmanni, tunc demum, cum*

* For the Meaning of this Expression, see 109 c. 7.

cum 15 annos compleverit, adds, that in *Feodo militari* the Heir shall not answer before his Age of Twenty-one, but in *Socagio potest & debet respondere, sicut & petere, cum plenæ ætatis fuerit. Lib. 2. c. 37. f. 86.* And again, *Lib. 5. c. 21. f. 422. Liberum Socagium petere non poterit ante tempus, de Seis- sinâ Antecessoris, per breve de reſto, ante ætatem XIV annorum, non magis quàm feodum mili- tare, antequam impleverit XXI annum & XXII attigerit.* *Lege XV.*

We read in our Books of a Custom of Alienation by an Infant much more unreasonable than the foregoing, as in 7 *H.4.35. a.* That in certain Boroughs an Infant might sell his Land when he could count twelve Pence, or measure certain Yards of Cloth. But it seems the Courts of Law paid but little Regard to so extravagant a Usage; for the Book says, that when an Infant has been brought before the Justices, and it has appeared to them by Inspection, that he was not of Discretion to do such a Thing, notwithstanding such Custom he has recovered in a *Dum fuit infra ætatem.*

In like Manner it is pleaded in 6 *Ed. 3. 49. b.* to be of the Usage of the Town of *Hereford*, that a Person might alien his Land when he could count twelve Pence, or measure an Ell of Cloth; and averred that the Person was of sufficient Age to do that; but the Court gave little Heed to the Custom, and held that it ought to be shewn in certain, how old the Person was at the Time of the Alienation. And the same Determination is on the same Custom concerning

Of Custom of
Alienation by
an Infant
when he
could count
and measure.

Lands in Gloucester, Pasch. 13 Ed. 3. Fitzb. Dum fuit infra etatem, 3.

And accordingly Lord *Hobart* says, that in Pleading a Feoffment by an Infant, a certain Age must be set down, that the Court may judge it an Age of Discretion, and it must not be left upon telling twelve Pence, or measuring a Yard of Cloth, for Custom cannot abrogate the Law of Nature. *Hob. 225.*

But this Custom, tho' not to be supported at present, seems to have had its Foundation in the old Common Law, for this was the Age when the Son was out of Ward as to Burgage Lands: 'Si autem fuerit filius Burgensis, tunc etatem habere intelligitur, cum denarios discretè sciverit numerare, pannos ulnare, & alia negotia similia paterna exercere; & sic non definitur certum tempus, sed per sensum & maturitatem suam.' *Bract. Lib. 7. c. 37. f. 86. b. Glanv. Lib. 7. c. 9.* The Reason of the Law indeed was soon so much altered in this Respect, that the Judges in 19 *Ed. 2.* disallowed even the Custom of a Borough to be out of Ward at that Age. In a Writ of Ravishment of Ward, the Defendant pleaded the Usage of *Ipswich*, that when the Infant was of Age to count and measure, he was of full Age to marry himself, and to have his Land; and avers, that the Infant was of the Age of twelve Years, and could count and measure. But as the Defendant had acknowledged, that the Infant was of such an Age as to be in Ward by the Law of the Land, it was holden that the Defendant

• Of Alienation by an Infant.

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dant could not purge his Tort by this Usage;
and therefore he was awarded to answer to
the Ravishment. 19 Ed. 2. Garde 127.

Chap. III.

Note; The Custom of Feoffment by an Infant at Fifteen, being against common Right, cannot be alledged in a Town, unless it be laid, that the Tenements are with- in some certain Fee or Borough, &c. 39 Ed. 3. 2. b.

In what Places
the Custom of
Feoffment at
15, may be
maintained.

See ante 32.
Co. Litt. 110. b.

G g

CHAP.

C H A P. IV.

The Father to the Bough,
And the Son to the Plough.

The Origin of
this Custom.
Spelm. of
Feuds 38.

Vide K. E-
thelred's Char-
ter in the Pre-
face to the 6th
Report.

What the
Custom is.

THE hereditary Lands among the Saxons (otherwise called *Bocland*) were not subject to any Feodal Service, and therefore could not escheat to any Feodal Lord: And this was the general Usage of *England*, till the *Conqueror*, introducing hereditary Feuds, imposed therewith, among the Rest of the Feodal Servitudes, this of Escheats. But even then, as at this Day, if a Man fled for Felony, and was outlawed, he being esteemed a common Enemy, *Caput Lupinum*, one out of the King's Protection, his Lands were forfeited to the Crown. And our *Kentish* Gavelkind retains these, as well as many other Properties of the Saxon *Allo-dium*; for by the Custom of *Kent*, if Tenant in Fee-simple of Lands in Gavelkind commit Felony, and suffer Judgment of Death, he shall incur Forfeiture of his Goods, but his Lands of that Tenure shall not be forfeited, nor escheat to the * King, or other Lord of whom they are holden; but the Heir, notwithstanding the Offence of his Ancestor, shall enter immediately, and enjoy

* Customs which are by Reason of the Land, as Gavelkind and Borough English, bind the King, but Customs by Reason of the Person or the Goods do not.
35 H. 6. 28. a. *Bro. Custom*, 5.

The Father to the Bough, &c.

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Chap. IV.

joy the Lands by Descent after the same Customs and Services, by which they were before holden. *Consuetud. Kanc. infra. Lamb. Preamb.* ^{610.} ~~vii.~~ 8 Ed. 2. *Itin. Kanc. Fitz. Prescription*, 50. 22 Ed. 3. *Prescription*, 40. *ibid. pl.* 60. *Dyer* 310. b. 2 *And.* 152. *Somm.* 48, 53, 146. *Bacon's Use of the Law*, Oct. Edit. 139. 1 *Sid.* 137. 1 *H. H. P. C.* 360. 3 *Bulst.* 215. *Dr. & Stud.* 40.

Which has given Occasion to the Proverbial Expression,

The Father to the Bough, And the Son to the Plough.

Stat. 17 Ed. 2. *de Prærog. Reg.* c. 16. Or as it is somewhat differently expressed in the Manuscript Copy of the *Consuetudines Kanc.* in *Lincoln's Inn Library* :

The Fader to the Bonde, And the Son to the Londe.

Nor shall the King have the Year, Day, and Waste of Lands in Gavelkind holden of a Common Person, where the Tenant is executed for Felony. *Consuetud. Kanc. infra.* 8 Ed. 2. *Itin. Kanc. Prescription*, 50. 20 *H.* 6. 8. b. *Stamf. de Prærog.* 49. b. 50. a. *Lamb. Preamb.* ^{610.} ~~vii.~~ 3 *Bulst.* 215. Which seems to be but a Consequence of the other Custom, according to the general Rule in *Bracton* 130. a. 131. a. *Non debet Rex de Jure habere annum & diem de aliquâ terrâ, que non possit esse Escheata Dominorum.*

How it is confined.

But this Custom holds only where the Defendant submits to the Judgment of the Law, and not where he withdraws himself from the Hands of Justice, and will not abide a legal Trial; for if Tenant in Gavelkind, being indicted for Felony, absent himself, and is outlawed after Proclamation made for him in the County; (or if formerly he had taken Sanctuary, and had abjured the Realm) his Heir shall reap no Benefit by the Custom, but the Lands shall escheat to the Lord, and the King shall have Year, Day, and Waste in them, if holden of another, in like manner as the Common Law directs, as to Lands which are not subject to the Custom of Gavelkind. *Consuet. Kanc. infra. Itin. Kanc. 55 H. 3. Rot. 86. 7 Ed. 1. Itin. Kanc. Rot. 31. Rex. 6 Ed. 2. Itin. Kanc. Plac. Coron. Rot. 62. 8 Ed. 2. Itin. Kanc. Prescription, 50. 22 Ed. 3. Prescription, 40. Statb. Custom, pl. 2. Lamb. Peramb. 620. 621. Stamf. de Prærog. 40. b. 2 Roll's Rep. 368. 1 H. H. P. C. 360. Wright on Tenures 210. And so it was adjudged in Canc. 28 Eliz. between Brocas and Savage, cited in the Margin of the last Edition of Dyer 310. b.*

‘ In Itinere *W. de Ralegh* in Com. *Kanc.*
 ‘ *Affisa Mortis Antecessoris, &c. si Adelo-*
 ‘ *phus, &c. ubi dicitur, quod Felonia An-*
 ‘ *tecessoris non impedit Seisinam Hæredis,*
 ‘ *nec Successionem; sed hoc specialiter in*
 ‘ *Com. Kanc. de Tenementis, quæ tenentur*
 ‘ *in Gavelkind, si ille, qui Feloniam fecerit,*
 ‘ *judicium sustinuerit.*’ *Braët. lib. 4. f. 276. b.*

It

And the Son to the Plough.

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It is said *obiter* in *Chapman's Case*, 2 Roll's Rep. 368. That if a Brother in Gavelkind is attaint, the Land shall escheat; tho' otherwise it is, if the Father be attaint; for *The Father to the Bough, and the Son to the Plough*: And the Reason there given is, That the Custom shall be taken strictly.

Chap. IV.
Whether a Brother shall inherit the Gavelkind Lands of his Brother executed for Felony.

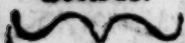
But this is a mistaken Opinion. Mr. Lambard in his *Peramb.* 911. tho' he admits that some have doubted whether the Brother or Uncle shall have Advantage of this Custom, is notwithstanding of Opinion himself, That whoever the Heir be, he shall enjoy this Privilege under the Custom, as well as the Son; because the Words of the *Customal* extend to the Heir in general, and are not restrained to the Son alone.

And it is a Distinction unknown to most of the Authorities, both antient and modern, the Words of which are general as to all Heirs; *Felonia Antecessoris non impedit Seisnam Hæredis, nec Successionem.* Bract. *supra.* And 8 Ed. 2. *Prescription*, 50. By the Custom of *Kent*, if a Man be hanged for Felony, the Lord shall not have the Escheat. And *Bacon's Use of the Law* 139. That the Land is not forfeitable nor escheatable for Felony. And 1 *H. H. P. C.* 360. That if the Ancestor be executed for Felony, the Land shall not escheat, but descend to the Heir.

And *Rot. Claus.* 8 Rich. 2. m. 2. *Kanc.* The King writes to the Sheriff of *Kent* to redeliver the Gavelkind Lands of a Man executed for Felony, which he had seised;

* Cum secundum Consuetudinem de Gavel-Taylor of
kind Gavelk. 1074.

Book II.



‘ kind in hoc casu nos habere non debemus
 ‘ annum, diem, neque vastum, nec capitales
 ‘ Domini inde Escheatam; sed *proximi Ha-*
 ‘ *redes* sic convictorum & suspensorum hære-
 ‘ ditatem suam immediate consequuntur, Fe-
 ‘ loniâ illâ non obstante.’

Dower of
 Gavelkind
 Lands not-
 withstanding
 Felony of the
 Husband.

And by the same Custom the Wife's
 Dower of the Moiety of Gavelkind Lands,
 was in no Case forfeitable for the Felony of
 the Husband, but where the Heir should lose
 his Inheritance. *Consuet. Kanc.* infra. 8 H. 3.
Prescription, 60. adjudg'd. *Lamb. Peramb.*
 612. *Noy's Max.* 28.

‘ Dos post Feloniam [mariti] peti non
 ‘ potest a muliere, &c. nisi in casu speciali,
 ‘ sicut in *Kanciâ*.’ *Bract.* lib. 4. f. 311.

This Custom
 extends not to
 High Treason.

This Custom holds only in Case of Fe-
 lony, and extends not to Treason; for if a
 Man be any way attaint of this Offence, his
 Gavelkind Lands are forfeited to the King,
 notwithstanding this Usage. *Lamb. Peramb.*
 610. *Dav.* 37. 1 H. H. P. C. 360. *Wright's*
Tenures 118.

Whether to
 Petty Treason.

Indeed it seems the Custom may extend to
 Petty Treason; for that Offence is by the
 Law properly comprehended under the
 Word Felony. *Co. Litt.* 391. a. The
 Lands escheat to the Lords of the Fee, as
 in other Felonies. *Stat.* 25 *Ed.* 3. c. 2. And
autrefois attaint of Murder is a good Plea to
 an Indictment of Petty Treason for the same
 Death; because it has the same Judgment in
 Effect, and the *very same Forfeiture.* 3 *Inst.*
 213.

Whether to
 Felonies by
 Statute.

Peramb. 610.

Mr. *Lambard* says, That ‘ peradventure this
 ‘ Rule holds not in Felonies made by Statutes
 ‘ of

of later Times; because the Custom cannot take hold of that which then was not at all. Chap. IV.

As Felonies by Statute are now so numerous, this may be a Question of considerable Importance; but it is remarkable, that no other Book, either antient or modern, making mention of this Custom, takes Notice of this Point; but all say, That the Custom extends to Felony, without offering at any Distinction.

Now Felony is the *Genus* of all capital Offences under Treason (except Piracy, which is an Offence by the Civil Law); and tho' the *Species* of this Offence are much encreased within Time of Memory, yet they are created in Similitude of the old Felonies, and are to be punished in the same Manner, and no other. And when a Statute makes a new Felony, or says, the Offender shall suffer as in Cases of Felony, it entirely refers it self for the Punishment to the Common Law: And the Word *Felony* being *Vocabulum Artis*, we must have recourse to the Common Law for an Explanation of the Nature of it; which tells us, That it is an Offence punishable with Death, with Forfeiture of Goods, with Corruption of Blood; as a Consequence whereof the Land will escheat to the Lord (*pro defectu Heredis*, and not as an immediate Forfeiture) in all Places except in Kent, where the Custom is allowed to have Power to exempt the Gavelkind Lands from the general Rule, and the Inheritable Blood remains as to Tenements of this Nature, notwithstanding the Attainder of the Ancestor. And it is material, that the Escheat of

Salk. 85.

The Father to the Bough,

Book II.

of the Lands is no Part of the Judgment in Felony, but merely a Consequence implied by the Law on suffering for any Offence of this Kind, to which the Custom of *Kent* is a necessary Exception.

If a Court has by Custom Power of holding Pleas, and an old Action is given by Statute in a new Case, it is within the Jurisdiction. 2 *Saund.* 254. *Green and Cole.* And the like Law on a Grant of Conusance of Pleas. *Hob.* 48. And it seems that the old Punishment of Felony being applied to a new Offence, our Custom may with a Parity of Reason extend to it.

Whether this Custom extends to Piracy.

Mr. *Lambard* likewise doubts whether this Custom extends to Piracy; which must be understood of an Attainder before Commissioners, by Virtue of 28 *H. 8. c. 15.* for on a Conviction of Piracy before the Admiral, no Forfeiture of Lands is incurred. The Words of the Statute are, That *such as shall be convicted of any such Offences, &c. shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of any Treasons, Felonies, Robberies, or other the said Offences done upon the Lands.* Which Words are merely relative, giving only the same Forfeiture for a Felony at Sea, as would be incurred by the like Offence at Land; and if Gavelkind Lands are not forfeitable in the latter Case, how can they be in the former?

Whether this Custom be in any other County besides *Kent.*

Twisden Justice says, in 1 *Sid.* 138. That he had heard that the Custom of *The Father to the Bough, &c.* was in no other County or Town except in *Kent.* But Mr. *Taylor* in his *Hist.*

Hist. of Gavelkind 106. mentions that the Gavelkind Lands in the Liberty of *Urchinfeild* in *Herefordshire* partake of the same Privilege. Chap. IV.

Indeed the same Author says, that this was the Right of all *Wales*; which is certainly a Mistake, for it appears by *Statutum Walliæ*, 12 *Ed.* 1. that even at the Time when the Lands in that Principality were partible among the Males, the Attainder of the Ancestor for Felony was a Bar to the Heir: *Si excipiat quod Antecessor, vel aliquis in descendendo commisit Feloniam, per quam sibi non competit actio, &c. terminetur per recordum Justiciariorum, vel per Inquisitionem Patriæ de suspensione, &c.*

In the Stat. *de Prærog. Regis*, c. 16. it is mentioned to be used in the County of *Glocester* by Custom, That after one Year and one Day the Lands and Tenements of Felons shall revert and be restored to the next Heir, to whom they ought to have descended, if the Felony had not been done.

But this Custom differs from that of *Kent* in one Respect, That the King shall have the Year, Day, and Waste; but not so of Lands in Gavelkind. *Stamf. de Prærog.* 50. a.

C H A P. V.

Of the Custom of Kent to Devise
Gavelkind Lands.

Book II.

WHether Gavelkind Lands in *Kent* were deviseable by the Custom of that County, or not, was a Question formerly much litigated; it being a very valuable Privilege before 32 *H. 8.* when it was not in the Power of the Owner of any Lands in this Kingdom, to alien them, without a special Custom of the Place where they lay, by any Act to be ambulatory till the Time of his Death; but he was put to depart with the legal Estate, by making a Feoffment to his own Use, or to the Use of his Will, and that Use he might devise; an Invention too but of later Times, and attended with some Inconveniencies. Nor did this cease to be a Matter of Importance on the general Liberty given by the Statutes of Wills to devise Socage Lands by Will in Writing; for these Statutes, being in the Affirmative, were holden not to take away a Custom of devising, *Co. Litt. 111. b. 3 Rep. 35.* and consequently the Assistance of the Custom was still wanted to make a Will of Socage Lands, when joined with a Devise of Lands holden by Knight-Service in *Capite*, good for the Whole of the Socage, which otherwise had been void for a third Part; 2 *Sid. 153.* and likewise to make effectual Devises by Parol; for I take it that the Custom was claimed even for them. 2 *Sid. 154. Somn. 161.* But this Question

Question is now rendred entirely useleſs by 12 Car. 2. 24. which has reduced all Lands to common Socage ; and the Statute *againſt Frauds and Perjuries*, 29 Car. 2. 3. ſect. 5. which enacts, That “ All Deviſes or Be-
“ queſts of any Lands or Tenements, deviſe-
“ able either by Force of the Statute of
“ Wills, or by this Statute, or by Force of
“ the Custom of Kent, or the Custom of any
“ Borough, or any other particular Custom,
“ ſhall be in Writing, and ſigned by the
“ Party ſo deviſing the ſame, or by ſome
“ other Perſon in his Preſence, and by his
“ expreſs Directions, and ſhall be atteſted
“ and ſubſcribed in the Preſence of the ſaid
“ Deviſor by three or four credible Wit-
“ neſſes, or elſe they ſhall be utterly void
“ and of none Effect.”

But as many Things grow Matters of greater Curioſity by ceasing to be of Uſe, I ſhall briefly take Notice of the moſt material Arguments and Authorities which occur in the Books, either for or againſt this Cuſtom.

Arguments con. the Cuſtom.

1. That it is a Rule in Law, That an Affize Arguments of *Mortdanceſtor* lies not of Lands deviſeable againſt the by Will ; tho’ it be not alledged by the Plea, Custom.
that they are actually deviſed. *Fleta* 296. b.
4 Ed. 2. *Fitzb. Mortdanceſtor*, 39. 22 Aff.
pl. 78. *F. N. B.* 196. I. Yet it appears by
Braët. f. 276. b. and by ſeveral antient Re-
cords cited in *Somner*, That an Affize of

Mortdancestor lies for Gavelkind Lands in *Kent*. *Somn.* 152.

2. That it is evident there was within the City * of *Canterbury* a special Custom to devise Lands; but there needed no such Custom, if all Gavelkind Lands in *Kent* had been deviseable. *Somn.* 152. The City of *Canterbury* having, within Time of Memory only, been separated from the County of *Kent*.

3. That most of the antient Wills of Gavelkind Lands in *Kent*, mention Feoffees to Uses, particularly the Will of *Fineux, Ch. J.* of

* *Itin. Kanc.* 55 H. 3. *Rot.* 85. 'Juratores dicunt super sacramentum suum, quod Consuetudo Civitatis *Cantuar.* talis est, quod quilibet de Civitate predictâ potest legare Messuagia sua, quæ habet in eadem Civitate, adeò benè sicut & alia bona & catalla sua.' And in 55 H. 3. *Itin. Kanc. Rot.* 18. it is pleaded, That the Tenements within the Borough of *Menstre* (now called *Minster*, in the Isle of *Thanet*) were deviseable by Will *secundum Consuetudinem Burgi, &c.* And in *Aff. in Com. Kanc.* 4 Ric. 2. in an Affize brought by *John Croke* and *Dionisia* his Wife, against *John Bolle* and *Alice* his Wife, the Tenants plead, That the Tenements are 'infra quoddam Dominium vocatum *Burgum Monachorum* in Villâ de *Sesaltre*, quod quidem Dominium est Prioris Ecclesiæ *Christi Cantuar*', &c. & etiam quod omnia terræ, & tenementa infra idem Dominium sunt, & a tempore quo non extat memoria, legabilia, & legata fuerunt pro voluntate tenentium eorundem, tam uxoribus hujusmodi tenentium, quam aliis; and pleads a Devise accordingly. Nor have I been able to find in the Records of the *Kentish Iters*, or among the Pleas before Justices of Affize, any one Title made under a Devise by the general Custom of the County, or indeed any Footsteps of such a Custom.

of *B. R. Read, Ch. J. of C. B. and Butler, Just.* who, had there been any Custom to devise, could not have been ignorant of it. *Somn. 152, 153.* Chap. V.

4. In the Register there be 14 Writs of *Ex gravi Querelâ*, for Lands deviseable; yet not one of them takes Notice of the Custom of any County. *Somn. 153.* Nor was there ever any such Writ for any Lands in the County of *Kent* at large out of some City or Borough. *Somn. 161.*

5. In several Wills of Lands to be found in the Registers of *Canterbury* and *Rocheſter*, in the Interim between the Statute of Uses, 27 *H. 8.* and of Wills, 32 *H. 8.* (a Time most proper for the Custom to have exerted it self) there are Clauses bequeathing to the Heirs at Law pecuniary Legacies, in Case they did not controvert the Devise; a plain Argument of the Distrust and Doubt of the Testator of their Validity. *Somn. 163, 164.*

6. It appears by many Offices before the Escheators, and continual Enjoyments accordingly, that since the Statute 32 *H. 8.* in many Cases, where Men have died seised of Gavelkind Land, and Land holden by Knight-Service in *Capite*, and have devised the Whole, the Heir has notwithstanding had a full third Part. *Somn. 154, 155. 2 Sid. 154.* Which had not been, had the Gavelkind Land been deviseable by Custom; as appears by 3 *Rep. 35. a.*

7. That there is no Mention made either in *Lambard's Perambulation*, or in the *Conſuetudines Kancie* of any such Custom.

8. *Pasc.*

8. *Pasc. 37 Eliz. C. B.* Between *Halton* and *Staribop*, it was agreed by the Court, on Evidence to a Jury of *Kent*, That Gavelkind Lands in that County were not deviseable by Custom. *Somn. 155.*

Arguments pro the Custom.

Arguments
for the Cu-
stom.

1. That the Customs of *Kent* are supposed to be the Remains of the old Common Law; and Lands during the *Saxon* Times were deviseable by Testament. *Nat. Bac. of Government*, Quarto Edit. 108. *Somn. 84.* As appears by the Will of *Ethelstan Atheling*, Son of King *Ethelred*, *Anno 1015.* transcribed in the Appendix to *Somn. 198.* and that of *Byrbtric* in *Lamb. Peramb. 492.* and the *Textus Roffensis*, now publish'd by *Hearne.*

44 *Ed. 3.*

33. *a.*

35 *Aff. pl. 1.*

2. To the first Argument made use of against the Custom they answer, That an Affize of *Mortdancestor* does lie of Lands deviseable, if the Ancestor died seised; indeed if the Defendant shew an actual Devise to himself, it is a good Bar to the Action. *Lauder and Brookes, Cro. Car. 562.* And of the same Opinion was *Glynne, Ch. J.* in the Case of *Browne and Brookes, 1659.* (according to a Report I have seen of that Case under the Hand of *Pemberton*, afterwards Chief Justice) and said, That the Books abridged by *Fitzb. tit. Mortdancestor, 39, 52.* to the contrary were not Law. To whom *Newdigate, Just.* assented, and said, That the Books, which report, that on the Plea that the Lands were deviseable, the Writ of *Mortdancestor* abated, are to be understood,
that

that on the Plea that they were devisable and *actually devised*, the Writ abated. Chap. V.

3. In Answer to the fourth Argument they rely on *F. N. B.* 198. L. which says, that the Writ *Ex gravi Querelâ* lies where a Man is seised of any Lands or Tenements in any City or Borough, or in *Gavelkind*, which Lands are deviseable by Will Time out of Mind. And in *Noy's Max.* 24. It is said, that *Gavelkind* Lands may be given by Will by the Custom.

4. There are in the Registers of *Canterbury* and *Rochester* divers Wills of Lands in the Times of *H. 6. Ed. 4. H. 7.* in several upland Villages in *Kent*, which cannot lay a Custom to devise merely within them- Co. Litt. 110. selves, and no Mention made of Feoffees to b. any Use. *Launder* and *Brookes*, *Cro. Car.* 561. *Browne* and *Brookes*, 2 *Sid.* 154.

5. In the Case of *Launder* and *Brookes* was shewn a Book of Reports, where in 41 & 42 *Eliz.* the Court of *C. B.* agreed, that there was such a Custom in *Kent*.

6. This Question was tried several Times on the Will of *William Brookes*; and there is Mention made in *Cro. Car.* 561. of two Verdicts in that Case for the Custom on Trials at Bar, and one Nonsuit of the Plaintiff (whose Title was from the Heir) after the Jury had withdrawn to consider of their Verdict, the Opinion of the Court being for the Custom; and tho' there had been one Verdict for the Plaintiff, yet *Finch* Ch. Just. shewed his Dislike of that Verdict. *Launder* and *Brookes*, *Cro. Car.* 561. And afterwards, on a Trial on the same Will and Custom

Of the Custom to devise.

Book II.

Custom it is said, that six Verdicts were produced, which had all been for the Custom, and tho' there was then a Verdict against the Custom, yet the Court disapproved of it. 2 *Sid.* 154. *Browne* and *Brookes*. And it being contrary to their Directions (according to the manuscript Note I have already cited) they carried their Dislike of it so far, as to stay the Entry of the Judgment in that Action, till a new Ejectment brought by the late Defendant should be tried.

7. In the Case of *Hammond* and *Thornbill*, *Style* 476. It is affirmed by *Serjeant Twifden* (a *Kentish* Man) that Gavelkind Lands, tho' they come to be holden by Knight-Service, are devisable by Will by the Custom of *Kent*.

Ante 77.

8. This Matter was again tried at the King's Bench Bar by a Jury of *Kent*, *Pasch.* 14 *Car.* 2. entred *Hill.* 13 *Car.* 2. *Rot.* 476. who found that Gavelkind Lands were devisable by the Custom of *Kent*. *Wiseman* and *Cotton*, 1 *Sid.* 77, 135. *Hard.* 325. *Ray.* 59, 76. 1 *Lev.* 79.

Which last Verdict seems to have settled the Question in Favour of the Custom: And accordingly the Clause of the Statute of Frauds above-mentioned takes Notice of the Custom of *Kent* to devise.

And the same Custom to devise Gavelkind Lands in this County was likewise found about the Beginning of *Queen Anne's* Reign by two Verdicts; one between *Arthur* and *Bockenham* in *C. B.* *Fitzb-Gib.* 233. and the other in the Case of *Bunker* and

Of the Custom to devise.

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Cooke in *B. R. Fitz-Gib.* 225. *Salk.* 237. Chap. V.
both on the Will of *William Bockenham*.

The Case was this; *W. Bockenham* devised to his Wife all his Lands, Tenements and Estate whatsoever, of which he should be possessed or invested with at the Time of his Decease: He afterwards purchased Lands of the Nature of Gavelkind in *Kent*, deviseable by Custom of that County; and the Question on a special Verdict was, whether these after-purchased Lands could pass by the Will: It was insisted, that if the Statutes of Wills did not enable a Man to devise Lands before he was seised of them, because the Words are, *every Person having Lands*, yet that Lands deviseable by Custom differ; because these Customs, as appears by the Writ *Ex gravi Querelâ*, are to devise his Lands and Tenements *tanquam bona & catal-la sua*, and a Man may dispose of the Chattels and personal Estate, that he shall acquire after the Time of his Will. But *Holt Ch. Just.* and the whole Court of *B. R.* held, that the Lands passed neither by the Statute, nor by the Custom; for that is to devise *Tenementa sua*, and therefore before he can dispose of them they must be *sua*, they must be his Property; and if they are not *sua* at the Time of the Devise, they are out of the Custom. And the Pleading in the Case of customary Devises is, that the Testator *being seised in Fee* did devise. And this Judgment of *B. R.* was affirmed in the House of Lords. *Fitzb.* 225. *Bunker and Coke*, *Salk.* 237. *S. C.* And the same was determined in the Common Pleas in the Case of *Arthur and*

This Custom enables not to devise Lands which the Devisor had not at the Time of the Will, but purchased after.

F. N. B. 199.

Of the Custom to devise.

Book II. *Bockenham. Fitzb.* 233. In which Book are the Arguments of *Holt* and *Trevor* Ch. J. very fully reported.

Of Evidence of the Custom of devising, &c. As the particular Customs of Gavelkind are traversable, it may be proper here to take Notice of some Evidence of an extraordinary Nature admitted in the Case of

Cro. Car. 561. *Launder* and *Brookes*, to prove this Custom of devising. 1. *Lambard's Perambulation of Kent*, out of which was shewn the Copy of the *Custumal*, saying, that Lands may be given or sold without the Lord's Licence. And a Precedent was produced out of the same Book, pag. 492. (as it seems by the Court themselves) of a Testament before the Conquest.

2. *Law-Books*, as *F. N. B.* 198. L. (*supra*) and a Book of Reports, where in 41 & 42 *Eliz.* the Court of C. B. agreed, that there was such a Custom in *Kent*.

The Custom of devising Lands of the Nature of Gavelkind is not confined to *Kent* alone, for *Jones* Just. in the Case of *Launder* and *Brooke*, says, that in *North-Wales* there is much Land, formerly of this Nature, by Custom deviseable by Writing, or without Writing. And *Twissden* Just. says, 1 *Sid.* 137. that the Custom of Devising still remains there, notwithstanding the Land is disgavelled by 34 & 35 *H.* 8.

And in the Liberty of *Urchenfield*, where the Lands are Gavelkind, there is a Custom found by Verdict of devising Lands purchased, as appears by a Record 20 *Ed.* 1. in *Receptu Scaccarii*, cited in *Taylor's Hist. of Gavelkind* 110.

C H A P.

CHAP. VI.

Of the Custom of GAVELET.

THE Writ of *Cessavit* was introduced Of *Cessavit*
 as the general Law of the Kingdom by Statute.
 by the Statute of *Glocester*, c. 4. (6 Ed. 1.) *b. l. 1. c. 4.*
 in the Case of Tenant in Fee-Farm: That
 if a Man lets his Land to Fee-Farm, or to
 find Estovers in Meat or Clothes to the
 fourth Part of the Value of the Land, and
 he who holds the Land so charged, lets it
 lie fresh and unoccupied, so that the Party
 can find no Distress there, for the Space of
 two Years together, the Lands may be re-
 covered by this Writ, unless the Tenant
 comes before Judgment and pays the Ar-
 rearages and Damages, and finds sufficient
 Sureties to pay the Rent for the Future.
F. N. B. 210. A. 2 *Inst.* 295. And an-
 other Writ of *Cessavit* was given in Imita-
 tion of the former by Stat. *Westm.* 2. 21.
 (13 Ed. 1.) to the Lord where the Tenant
 with-holds his accustomed Services for two
 Years, letting the Land lie without sufficient
 Distress; or in Case he encloses the Land, so
 that the Lord cannot distrain. *F. N. B.* 208.
H. & K. 2 *Inst.* 401. And a like Writ lies
 by the same Statute, c. 41. for Lands given
 for Alms, &c. if such Alms are withdrawn
 for two Years.

But the County of *Kent* has from Time Of *Cessavit*
 immemorial had a Proceeding for the *Ces-* by the Custom
ser of the Tenant, called *Gavelet*, (*Consuet.* of *Kent*.)

Of the Custom of Gavellet.

Book II. *Kanc.* 55 *H.* 3. *Itin. Kanc. Rot.* 16 & 79.

6 *Ed.* 2. *Itin. Kanc. Rot.* 29. *Plac. Coron. Somn.* 31.) very different from that given by Statute.

If Tenant in Gavelkind with-holds from his Lord his due Rents or Services, the Custom of this Country gives the Lord a special and solemn Kind of *Cessavit* after this Manner; The Lord, after such Cessing, ought by * Award of his three Weeks Court to seek from Court to Court till the fourth Court

* This Proceeding bears a strong Resemblance to that of the Feudal Law, for the Contumacy of the Tenant. ‘ Dominus vocat militem, qui ab eo feudum possidebat, dicendo eum in *culpam* incidisse, per quam feudum amittere debeat; hic non respondet: Quæritur, quid faciendum sit Domino? Respondet eum ad Curiam vocari debere, & si non venerit, iterum eum debere vocari usq; in spatio tertio septem vel decem dierum, arbitrio ejusdem Curiae terminando. Quod si neq; venerit ad tertiam vocationem, hoc ipso feudum amittat: Et ideo debet Curia Dominum mittere in possessionem. Sed si infra annum venerit, restituitur ei possessio: Alioquin & beneficium & possessionem amittit. *Feudor. Lib.* 2. *tit.* 22.’ And With-holding the Services is reckoned, by the Constitutions of the Emperor *Conrad*, amongst the Offences for which the Tenant incurs a Forfeiture. *Si servitium debitum facere recusaverit, vel feudum abnegaverit. Lib.* 3. *tit.* 1. & *Spelm. Glos. sub verbo Felonia.* But I take it that the Origin of our Custom is rather to be referred to the old Common Law of this Kingdom, before the Introduction of Feuds; for by the eighteenth Law of *Canute*, ‘ Nemo Namium capiat, nec in Comitatu nec extra Comitatum, priusquam ter in Hundredo suo rectum sibi perquisierit. Si tertia vice rectum non habeat, eat quartâ vice ad Comitatum (*Scyregemote*) & iste Comitatus quartum statuito diem; & si nec tum quidem impetrârit, liberam sui juris ubivis

Court in the Presence of Witnesses, whether any Distress may be found on the Tenements, or no; and if within this Time he can find none, then at the fourth Court it shall be awarded, that he take the Tenements into his Hands as a *Distress* or *Pledge* for the Rent or Services withdrawn, and he shall detain them for a Year and a Day without manuring or occupying them; within which Time if the Tenant comes, and pays the Arrearages, and makes reasonable Amends for with-holding the same, he shall enjoy his Tenements again: But if he come not within that Time, then at the next * County Court, the Lord ought in Presence of Witnesses to declare his former Proceeding, to the End that it may be notorious; and after this County Court holden he shall, by Award of his own Court, enter into the Lands, and occupy them as his own Demesnes. *Consuet. Kanc. infra. Lamb. Peramb.* ^{612 613} ₃₃₃. And if the Tenant comes afterwards, and is desirous to have the Tenements

‘ubivis recuperandi licentiam assequitor.’ And the very same Law is to be found among those of William the Conqueror. *Namium*, from the Saxon Word *Name*, signifies a *Distress* or *Pledge*; and this Term is applied to our Custom by *Bracton*. ‘Si Dominus per Considerationem Curie suae pro defectu servitii ceperit tenementum in manum suam, sicut *simplex Namium*, donec de redditu fuerit satisfactum, &c. Et de hac materia satis inveniri poterit in Itinere in Com. Kanc. Anno Regni H. 12. *Bract. Lib. 4. c. 27. fol. 205. b.*

* So read *Counte* with *Lambard's* Copy of the *Customal*, and the MS. of *Lincoln's Inn*, and not *Courte*, as is printed by *Tottel*.

Book II.

ments again of his former Estate, he shall, before he be re-admitted Tenant, pay the whole Rent in arrear, and perform his other Services, and likewise make amends to the Lord for the undue Detention of them: Concerning the Measure of which Amends the Copies of the *Custumal* differ; some assessing it at 5 *l.* others at nine Times the Rent, others saying only in general, that he shall make Composition, leaving the Quantity uncertain. Nor are the Evidences of this Custom on Record more reconcileable one with the other in this Instance, tho' they agree well enough in other Particulars.

V. *infra.*

Assize.

‘ 55 H. 3. *Itin. Kanc. Rot. 7.* Assisa venit recognitura si *Milefenta*, quæ fuit Uxor *Johannis de Langeden*, & alii injuste disseisiverunt *Alexandrum Mayle de Tenemento suo in Eastbarling*. Assisa capta per Defaltam.

Verdict finds the Custom of *Kent* concerning *Cesser*.

‘ *Juratores* dicunt super sacramentum suum, quod prædictus *Alexander* tenuit prædicta tenementa de prædictâ *Milefentâ* per certum servitium, & quia prædictum servitium ei aretro fuit, ipsa per Considerationem Curiae suæ distrinxit pro prædicto redditu; sed dicunt, quòd ipsa, incontinenti postquam prædicta districtio ei adjudicata fuit, adiit tenementum illud, & illud in manu suâ tenuit, & in illud manuoperata fuit, & arbores in eo crescentes abscidit, quod ei facere non licuit secundum *Consuetudinem Kanc*; quæ talis est, quòd cum redditus aliqui aretro est ex aliquo tenemento, quod tenetur in *Gavelykynde*, ipse debet adunare Curiam suam, & ibi ostendere qualiter redditus

ditus suus aretro est, & ibi in Curia illa considerari debet districtio per ea, quæ inventa fuerint in tenemento illo, & illam districtionem tenere quousq; satisfactum fuerit ei tam de redditu, quam de arreragiis; & si nulla catalla fuerint inventa in tenemento illo, tunc per considerationem Curie suæ debet Dominus feodi capere feodum in manu sua, absq; aliquâ manupolatione in eo faciendâ, & postea accedere ad Comitatum, & ibi ostendere qualiter redditus suus ei aretro est, & quod ipse nihil invenit in tenemento suo per quod distringere potest pro prædicto redditu suo, & ibi dicendum est ei, quod redeat ad Curiam suam, in quâ considerari debet, quod prædictus Dominus feodi distringere possit pro prædicto redditu suo & ejus arreragio, & tenementum, quod de ipso tenetur, in manu suâ capere, & in eo manuporare, & explecia omnimoda inde provenientia capere quousq; de prædicto redditu simul cum arreragiis ei plenè satisfactum fuerit: Et priusquam omnia prædicta adimpleta fuerint, non licebit Domino feodi aliquam operationem in tenemento suo facere. Unde dicunt, quod eadem *Milifenta*, non observatâ prædictâ solemnitate, seifivit prædictum tenementum in manu suâ, & in eo manuporata fuit, & quod ipsa disseifivit prædictum *Alexandrum* de tenemento suo. Ideo Consideratum est quod prædictus *Alexander* recuperet seifinam suam, &c.

21 Ed. 1. Itin. Kanc. Rot. 23. Berewicke Roll. An Affize brought by Adam de Wandle-

Book II. *Wandleworth* and *Joan* his Wife, against
 Affize. *Stephen de Bencester*, who pleads, That the

The Tenant
 pleads, That
 he seized the
 Lands by the
 Custom of
Kent, for the
 Cesser of his
 Tenant.

The Custom.

Manor of Alynton, by the Service of 20 d.
 and Suit of Court; ‘ Et quia Servitium illud
 ‘ aretro fuit per unum annum & unum
 ‘ diem, postquam idem *Adam & Johanna*
 ‘ habuerunt prædictum tenementum, ipse ce-
 ‘ pit tenementum illud in manum suam se-
 ‘ cundum Consuetudinem usitatam in Comi-
 ‘ tatu isto de Tenementis, quæ tenentur in
 ‘ Gavelykend; quæ quidem *Consuetudo talis*
 ‘ est, scil. quòd quando Redditus alicujus
 ‘ aretro est de aliquo tenemento, quod tene-
 ‘ tur in Gavelykend, ipse debet adunare Cu-
 ‘ riam suam, & ibi ostendere qualiter red-
 ‘ ditus suus aretro est, & ibi in Curia illâ
 ‘ considerari debet Districtio per ea, quæ
 ‘ inventa fuerint in Tenemento illo, & illam
 ‘ districtionem tenere quousq; satisfactum
 ‘ fuerit ei tam de redditu, quam de arre-
 ‘ rariis; & si nulla Catalla fuerint inventa
 ‘ in Tenemento illo, tunc per Consideratio-
 ‘ nem Curia suæ debet Dominus feodi ca-
 ‘ pere Feodum in manum suam, absq; aliquâ
 ‘ manuoperatione in eodem faciendâ, & * il-
 ‘ lud tenere per unum Annum & unum Diem,
 ‘ & postea accedere ad Comitatum, & ibi
 ‘ ostendere qualiter redditus suus aretro est,
 ‘ & quod ipse nihil invenit in Tenemento
 ‘ illo, per quod distringere potest pro præ-
 ‘ dicto redditu suo, & ibi dicendum est ei,
 ‘ quod redeat ad Curiam suam, in quâ con-
 ‘ siderari debet, quod prædictus Dominus
 ‘ feodi

* These Words are not in the foregoing Record,
 tho' the greater Part of this is copied from the other.

‘ feodi capiat tenementum, quod de eo tene-
 ‘ tur, in manum suam, & in eo manuope-
 ‘ retur, & explecia omnimoda inde prove-
 ‘ nientia capiat, quousq; tenens venerit *ad no-*
 ‘ *vies deaurandum & novies solvendum*; si
 ‘ tenementum suum rehabere voluerit. Un-
 ‘ de dicit, quod quia redditus prædictus are-
 ‘ tro fuit de Tenemento prædicto, & ipse
 ‘ nullam in eo invenit distractionem, ipse so-
 ‘ lennitate prædictâ in omnibus observatâ
 ‘ cepit tenementum illud in manum suam
 ‘ per Considerationem prædictam, sicut ei
 ‘ bene licuit, absq; aliquâ disseisina sive inju-
 ‘ riâ inde faciendâ, &c.’ The Demandants
 in their Replication deny not the Custom;
 but that the Tenements are holden of the
 Manor. And afterwards there is a *Retraxit*.

55 H. 3. *Itin. Kanc. Rot. 15. in dorso.* Assize.

In an Assize of *Mortdancestor* the Tenant
 pleads, ‘ Quod prædictus *Nicholaus* aliquo

‘ tempore tenuit prædicta tenementa de ipso
 ‘ per certum servitium in Gavelykynde; quod
 ‘ quia ei aretro fuit, ipse per longum tempus
 ‘ ante mortem ipsius *Nicholai* distrinxit pri-
 ‘ mo feodum suum, & postea cum nichil in-
 ‘ venisset in feodo suo per quod distringere
 ‘ posset pro arreragiis prædicti redditus, ipse
 ‘ per Considerationem Curiae suae seisivit tene-
 ‘ mentum suum in manum suam jam triginta
 ‘ & sex annos elapsos, & sic tenementum il-
 ‘ lud in manu suâ hucusq; tenuit, quousq;
 ‘ idem *Nicholaus*, vel aliquis hæredum suorum
 ‘ ad eum accederet *finem facturus pro arreragiis*
 ‘ prædicti servitii, prout ei bene licuit secun-
 ‘ dum Consuetudinem *Kancie*; unde dicit quod
 ‘ prædictus *Nicholaus* non obiit seisitus, &c.’

The Tenant
 pleads, That
 he seized the
 Premises by
 the Custom of
Kent, for
 Cesser.

Book II,
Affize.

Verdict, That
the Lord
seized the
Premises for
the Cesser of
his Tenant, in
the Name of
Gavelet; but
that he neg-
lected to ap-
ply to the
County Court,
&c. as the
Custom re-
quires, &c.

55 H. 3. Itin. Kanc. Rot. 79. An Affize
of *Mordancestor*, by *John* Son of *Richard le*
Mariner, against *Sarah de Polstede*. 'Capi-
atur Affisa per defaultam. Juratores dicunt
' super sacramentum suum, quòd reverà pre-
' dictum tenementum fuit aliquo tempore
' ipsius *Ricardi le Mariner*, de cujus morte,
' &c. & quòd idem: *Ricardus* tenuit præ-
' dictam terram de quadam *Agnete de Hen-*
' *ley* per certum servitium, & de quo servi-
' tio prædictus *Richardus* per sex annos ante
' mortem suam non satisfecit prædictæ *Ag-*
' *neti*, immò dimisit terram illam jacere in-
' cultam, propter quod ipsa *Agnes* seifivit
' prædictum tenementum in manum suam
' per Considerationem Curiae suæ, nomine
' *Gaveletti*, & illud tenuit in manu suâ per
' unum annum; sed dicunt quòd eadem *Ag-*
' *nes* per prædictum annum non adivit Co-
' mitatum, prout moris, ad habendam ibi
' Considerationem Comitatus, prout Con-
' suetudo *Kancie* requirit: Et quòd eadem
' *Agnes* nihil habuit in prædicta terrâ, nisi
' nomine pignoris. Consideratum est quòd
' prædictus *Johannes* recuperet seisinam su-
' am, &c.'

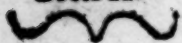
The next Record I shall insert for the Pe-
culiarity of the Judgment; which indeed
seems rather founded on the Consent of the
Parties, than the Right of the Matter.

Affize.

7 Ed. 1. Itin. Kanc. Rot. 19. Rex Roll.
' Affisa venit recognitura si *Johanna*, quæ fuit
' uxor *Rogeri de Romenal*, & *Stephanus* filius
' ejus injuste disseisiverunt *Rogero* filium
' *Johannis* de, &c.

Et

* Et prædicta *Jobanna* dicit, quòd prædi- Chap. VI.
 * ctus *Rogerus* tenet tenementum prædictum The Tenant
 * de prædicta *Jobanna*, et dicit quòd servi- pleads the Cu-
 * tium, quod de prædicto tenemento ei de- stom of Kent
 * bet, ei aretro fuit de uno anno & amplius, concerning
 * per quod Curia prædictæ *Jobannæ* simul Cesser; and
 * cum ipsâ *Jobannâ* adivit Comitatum simul that she seized
 * cum ipsâ, & in pleno Comitatu illo semel, the Lands on
 * bis, ter quæsta fuit de ipso *Rogero*, quòd that Account.
 * servitium suum debitum ei aretro fuit per
 * unum annum & amplius, nec per aliquam
 * districtionem illud servitium de eo habere
 * potuit; & dicit quod *Consuetudo Comita-*
 * *tus istius* talis est, quòd si tenens alicujus
 * in servitio suo defecit, & servitium illud
 * detinuit per unum annum & unum diem,
 * & super hoc convincatur, quòd licet Do-
 * mino suo tenementum illud ingredi, & illud
 * in manum suam tenere, quousq; ei satisfactum
 * fuerit de prædicto servitio, & de arreragiis,
 * secundum Consuetudinem *Kancie*: Et dicit,
 * quòd idem *Rogerus* convictus fuit quòd
 * servitium suum de prædicto tenemento ei
 * aretro fuit per duos annos & amplius, per
 * quod Comitatus consideravit, quòd ea-
 * dem *Jobanna* ingrederetur tenementum
 * illud, & illud teneret quousq; ei satisfactum
 * fuit in forma Consuetudinis prædictæ; &
 * dicit, quòd ratione ejusdem Considerationis
 * ingrediebatur ipsa terram illam, & illam
 * adhuc eâ ratione tenet; & quod taliter
 * intravit terram illam, & non per disseisi-
 * nam, petit quòd inquiratur per Assisam. Et
 * quia *Juratores* super sacramentum suum Verdict ac-
 * testantur, & dicunt quòd prædicta *Jobanna* cordingly.
 * & *Stephanus* ingrediebantur prædictam ter-



Judgment,
&c.

ram eâ ratione, quam prædicta *Johanna* dicit, & non per disseisinam, & super hoc veniunt prædicti *Stephanus* & *Johanna*, & concedunt, quòd prædictus *Rogerus* rehabeat prædictam terram quacunq; horâ ei satisfactum fuerit de redditu prædicto & arreragiis, in formâ Consuetudinis prædictæ; Ideò dictum est prædicto *Rogero*, quòd satisfaciat ei de prædicto servitio & arreragiis, &c. Postea veniunt Juratores, & adinvicem examinati & requisiti quantum aretro fuit prædictæ *Johannæ* de arreragiis servitii prædicti *Rogeri*, dicunt quòd quatuor libræ decem & novem solidi: Et Ideo Consideratum est quòd prædictus *Rogerus* recuperet seisinam suam de prædictis tenementis, & idem *Rogerus* satisfaciat eidem *Johannæ* de arreragiis prædictis. Et præceptum est Vicecomiti, quòd de terris & catallis prædicti *Rogeri* fieri faciat, &c. de die in diem, & ea sine dilatione habere faciat prædictæ *Johannæ*, &c.

This Custom of *Gavelet* is likewise pleaded in *Itin. Kanc.* 39 *H.* 3. *Rot.* 3. in dorso. 43 *H.* 3. *Itin. Kanc.* *Rot.* 2. 55 *H.* 3. *Itin. Kanc.* *Rot.* 16. 6 *Ed.* 2. *Itin. Kanc. Plac. Coron.* *Rot.* 29. But as it is in a more brief Manner than in the foregoing Records, it will not be necessary to insert them.

5 *Co.* 84. *b.* It is said, That there is a Custom in *Kent*, that if the free Tenants of a Castle do not pay their Rent, they shall lose their Land holden of it.

Mr. *Lambard* in his *Perambul.* 614. ³³⁴ says, That he cannot certainly affirm whether this Custom were put in Ure in his Time: But the

the Instances already given sufficiently shew that it was anciently in Use as a common Remedy; and even a private Prescription to the same Effect has been holden good and reasonable. *Per Frowike, 21 H. 7. 15. b.* There has been a Case in our Books, that a Man prescribed, that he, and all those whose Estate he has in the Manor of *D.* have used Time out of Mind, that if any of their Tenants in the said Manor ceased to pay his Rent, and no Distress could be found on his Tenancy for the Space of a Year, they should enter into the Tenements, and hold them for ever: And this was adjudged a good Prescription*. And it is certainly stronger, as the Custom of a whole County.

Nor does any Thing hinder but that it may be put in Practice at this Day, if the Lord, after he has gone through the Ceremonies required by the Custom, will avoid the Doubt above-mentioned concerning the Measure of the Amends, by reaccepting the Person as his Tenant, on the easy Terms of discharging the Arrears.

This was formerly esteemed so proper a Remedy, that the Legislature, in the 10th Year of *Ed. 2.* thought it worthy their Imitation, and framed the Statute of *Gavellet* for Rents arrear in *London*, after the Manner of our Custom, as will appear on Comparison. *Vide le Stat.*

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* But a Custom of the Town of *B.* that if a Tenant ceased to pay his Rent for two Years, the Lord might enter into the Lands till Composition made with him for the Arrears, was held a bad Custom, because only alledged in this single (*upland*) Town, and not in the others round about. *43 Ed. 3. 32. a.*

C H A P. VII.

Of the Manner of Trial in a Writ
of Right of Gavelkind Lands ;
And of the Trial of any Point of
the Customs of Kent.

Book II.

THE Tenants in Gavelkind in the County of *Kent* claim certain Privileges, not properly by Custom, but by an antient Grant of *Hen. 3.* in Relation to the Trial in a Writ of Right, when the Mife is joined on the mere Right.; which Mr. *Lambard* following his own Copy of the *Customal*, supposes to differ in two Points from the Trial in the same Action for Lands at Common Law.

Of the Grand
Affize in a
Writ of
Right.

1. That where the Land in Contest is of the Nature of Gavelkind, the Grand Affize shall not be chosen in the usual Manner by four Knights, but by four Tenants in Gavelkind, who shall not associate to themselves twelve Knights, but that Number of Tenants in Gavelkind.

2. That Trial by Battle shall not be admitted in a Writ of Right of such Lands.
Lam. Peramb. ⁶⁰⁹/₃₄₉.

And these two Privileges are taken Notice of in a short Note of Cases, wherein the Grand Affize or Battle does not lie in a Writ of Right, in *13 Ed. 1. Fitzb. Droit, 51.* Neither the Grand Affize nor Battle shall be joined,

joined, where the Demandant claims to hold in Frank-marriage, or in Socage, as in the Ancient Demesnes of the Crown; or in *Gavelkind*, as in *Kent*; or in many other Manners, as in Cities or Boroughs. And the same may be seen in an old Manuscript Collection of Statutes in the King's Library at *Cambridge*, under the Title of *Statutum de Magnâ Assisâ jungendâ*; and likewise under the same Title in a Manuscript in *Lincoln's Inn* Library.

So in *Itin. Kanc. 21 Ed. 1. Rot. 40. in dorso. Berewicke Roll.* In a Writ of Right, brought by *John and Thomas Everard*, against *Robert de Chaumpayne*, for four Acres of Meadow in *Darvinton*; the Demandants make Title as to Lands in *Gavelkind*; *Et quòd tale sit jus suum offerunt secundum * Consuetudinem de Gavelykend, &c.* The Tenant pleads, That two Acres of the aforesaid Meadow, are *liberum feodum*, & dicit, *quòd Placitum de libero feodo habet terminari sicut alibi, scil. per Duellum, vel magnam Assisam, & placitum istud, secundum narrationem prædicti Johannis & Thomæ, oportet terminari tantum per Juratam loco magnæ Assisæ; unde petit Judicium, &c.* The Demandants reply, That the Whole is *Gavelkind*; and the Jury find that one Acre of the said Meadow is *liberum feodum*, and thereupon there is Judgment against the Demandants.

The

* This is the constant Manner of concluding the Count in a Writ of Right of these Lands, as may appear on Perusal of the Records, cited in the Margin of p. 257.

Custumal are, *Ils cleymant per especial Fet le Roy Henrie Pere le Roy Edward, que ore est, que Dieu garde, que de Tenements, que sont tenus in Gavylekende ne seit prise Battaile, ne graunde Assize per XII Chivalers, sicome ail-lours est prise per le Reaume; ceo est ascarvoir la ou Tenant e le Demandant tenent per Gavylekende, mes en lu de ces grandes Assises seient prises Jurees per XII homes Tenantz in Gavylekende, issint que quatre Tenants in Gavylekende elisent XII tenentz de Gavylekende Jurors.*

This special Kind of Assize is undoubtedly their Right; for the Charter above-mentioned is enrolled, *Rot. Claus. 16 Hen. 3. m. 14.* in the following Words:

Charter of
Hen. 3. grant-
ing that the
Grand Assize
for Gavelkind
Lands shall be
by Tenants
in Gavelkind.

‘ Rex concessit per Cartam suam, pro se
‘ & hæredibus suis, hominibus de Com. *Kanc.*
‘ quòd de Tenementis, quæ tenentur in Ga-
‘ velykynde, in eodem Comitatu de cætero
‘ non teneantur magnæ Assisæ per XII Mi-
‘ lites, sicut alibi capiuntur in regno nostro,
‘ sed loco magnarum Assisarum illarum
‘ capiantur Juratæ per duodecim homines
‘ tenentes in Gavelykynde, in formâ & in
‘ eisdem locis, secundum quod Magnæ As-
‘ sisæ priùs inde capiebantur; ita quòd qua-
‘ tuor tenentes in Gavelykynde eligant duo-
‘ decim tenentes in Gavelykynde inde Jura-
‘ tores, sicut quatuor Milites eligere consue-
‘ verunt duodecim Milites in Magnâ Assisâ.
‘ Et si forte contingat, quòd prædicti duode-
‘ cim Juratores convinci debeant, convin-
‘ cantur per viginti quatuor Milites de eodem
‘ Comitatu, & infra eundem Comitatum
‘ coram

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‘ coram Justiciariis nostris Itinerantibus in
‘ adventu eorum. Et mandatum est Vice-
‘ comiti *Kanc.* quòd prædictam Cartam in
‘ Comitatu suo legi & firmiter teneri faciat
‘ secundum quod Carta illa continet. Teste
‘ Rege apud *Westm.* undecimo die *Februarii*.’

And there went afterwards a Precept to the Sheriff to proclaim this Charter in the County Court.

Rot. Claus. 17 H. 3. m. 17.

‘ Rex concessit probis hominibus de Com.
‘ *Kanc.* quod loco magnarum *Affisarum*, quæ
‘ capi consueverunt per XII Milites, de
‘ Tenementis quæ tenentur in *Gavelykynd*,
‘ inter *Gavelykyndeis* de cætero capiantur
‘ Juratæ per XII Homines *Gavelykyndeis*,
‘ sicut plenius continetur in Cartâ, quam
‘ Rex eis inde fieri fecit. Et mandatum est
‘ Vic. *Kanc.* quod prædictam Cartam in
‘ pleno Comitatu suo legi faciat & teneri.
‘ Teste Rege apud *Westm.* septimo die No-
‘ vembris.’

A recent Grant of this Kind to the good Men of a County not incorporate, would be of little Effect; but in ancient Times such Grants were allowed good. However, the Co. Litt. 3. a, Validity of this Privilege depends not merely on the Charter, but is confirmed by the * Practice of the Courts of Law agreeable to the Grant. In *Braeton*, lib. 5. c. 5.

L 1

f. 332.

* 39 H. 3. *Itin. Kanc. Rot.* 3, 4, 18, 25. in dorso,
& 55 H. 3. *Itin. Kanc. Rot.* 28, 29, 51, 57. in dorso,
67. in dorso. Where the Entries are in this Manner;
the

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f. 332. a. is the Writ to summon this Jury.

Rex Vic. Salutem, Summoneas, &c.
 quatuor legales homines de Com. tuo, qui
 tenent in Gavelkynd, quod sint coram Ju-
 sticiariis nostris, &c. ad eligend' super
 sacramentum suum XII de legalioribus ho-
 minibus de Vicineto de, &c. qui teneant
 in Gavelkynd, & melius sciant, &c. ad
 faciendam Juratam loco magnæ Assisæ
 provisam & concessam, &c.

And the Writ *de Pace*, or of Prohibition
 in a Writ of Right of Gavelkind Lands,
Reg. 7. b. takes Notice of this Method of
 Trial.

Rex Vic. *Kanc.* Salutem. Prohi-
 bernus tibi ne teneas placitum quod est in
 Comitatu tuo inter *A.* petentem & *B.* te-
 nentem de tanto, &c. quod, &c. quia
 idem *B.* qui tenens est posuit se in jura-
 tam loco magnæ Assisæ provisam & conces-
 sam, & petit recognitionem, &c.

Whether Bat-
 tle may be
 waged in a
 Writ of Right
 of Gavelkynd
 Lands.

But still there may be some Doubt, whe-
 ther the waging *Battle* in a Writ of Right
 brought for Gavelkind Lands be disallowed
 by the Custom; since there is no Grant of
 any

the Tenant ' Ponit se in Juratam de Gavelykynde
 loco Magnæ Assisæ Domini R. provisam & concessam,
 & petit recognitionem fieri utrum majus jus, &c. Et

Jur' Jur'
 Radulphus le Francys, Jobannes de Hamme, Will'us

Jur' Jur'
 Casimer & Jobannes de Lenston, quatuor homines, qui
 tenent in Gavelykynde, veniunt & eligunt istos scil.

Jur'
 Adam de Twydale, &c. (naming all the Twelve) qui
 dicunt super sacramentum suum, &c.

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any such Privilege in the foregoing Charter of *Hen. 3.* on which the Claim is founded. Chap. VII.

And it is observable, that the Word *Battle* does not occur in the *Customal*, as printed by *Tottel*, nor in the Manuscript of *Lincoln's Inn*; but only *Ne soit prise Grande Assize*.

And in the above Writ *de Pace* after the Words *Quod, &c.* are implied *idem A. clamat versus præd. B. per breve nostrum de recto, nisi duellum fuerit inde vadiatum*. And I have seen no less than six old Manuscript Copies of the Register (one of which is in *Lincoln's Inn* Library, and four others in that of the University of *Cambridge*) wherein this very Writ for Gavelkind Lands has the Words *Nisi duellum, &c.*

It is further remarkable, that one of the last Instances in our Books, of Battle joined in a Writ of Right, was between *Lowe* and *Co. Ent. 182.* *Kime* Demandants, and *Paramour* Tenant, for Lands in the Isle of *Harty* in *Kent*, which were Gavelkind, for the Title of the Tenant depended on the Alienation of an Infant. *Dyer 301.* Where is a pompous Account of the Ceremony preparatory to the Combat. And it is not to be doubted, but the Judges would have been well pleased to have ousted the Parties of this barbarous Method of Trial, had the Custom warranted them so to do, since the Example was so much disliked, that Queen *Elizabeth* thought fit to interpose and accommodate the Matter. *Speed's Chronicle 1166.*

It is true indeed, that by the Common Law, Battle does not lie in a Writ of Right *de Rationabili Parte*, or a *Nuper obiit* between Coparceners, because of the Privy of Blood. *F. N. B. 9. G. Plow. 306.* which might possibly give Occasion to the other Opinion.

Whence the Jury ought to come for the Trial of any Custom of Kent.

Issues joined on any Custom of the County of *Kent* were, even before 4 *Ann. c. 16.* to have been tried by a Jury of the Body of the County; as appears by the Record formerly mentioned, p. 99. between *Beddyl* and *Crouther*, *Mich. 11 H. 8. B. R. Rot. 88.* Where the Issue being on the Custom of *Kent*, it is entred on the Roll, that the Court of *B. R.* before they awarded the *Venire* to the Sheriff to return the Jury, consulted with the Judges of the Common Pleas about the Manner of it, and then *because the said Issue touched and concerned the Commonalty of the County of Kent*, awarded the *Venire de Corpore Comitatus.*

And in this the Court seem to have imitated the antient Practice of the Justices in *Eyre*, who on Questions concerning the Customs of this County often consulted (as the Records testify) * *totum Comitatum*; by which Expression may possibly be meant all those that were bound by the General Summons to give their Attendance on that Court; and who they were appears by the Writ

* Ante 54, 64, 141, 194, 222. And if they made a false Presentment, they were fined. *V. Post* and *Stat. Westm. 1. (3 Ed. 1.) c. 18.*

Writ in *Bracton*, Lib. 3. c. 11. pag. 109. b. Chap. VII.

‘ Rex Vic. Salutem. Summoneas per bonos
 ‘ Summonitores, omnes Archiepiscopos, E-
 ‘ piscopos, Abbates, Priores, Comites,
 ‘ Barones, Milites, & liberè Tenentes de
 ‘ totâ Balliva tuâ, & de quâlibet villâ qua-
 ‘ tuor legales Homines & Præpositum, & de
 ‘ quolibet Burgo duodecim legales Burgenſes
 ‘ per totam Ballivam tuam, & omnes illos,
 ‘ qui coram Justiciariis Itinerantibus venire
 ‘ solent & debent, quod sint apud talem lo-
 ‘ cum tali die, &c. coram dilectis, &c.
 ‘ quos Justiciarios nostros constituimus, au-
 ‘ dituri & facturi præceptum nostrum.’ And
 agreeably to this Writ, it is claimed in the
Custumal of *Kent*, that the Commonalty of
 Gavelkind Men, who hold nothing but Te-
 nements in Gavelkind, are not bound to
 come to the common Summons of the *Eyre*,
 but by the Borsholder and four Men of the
 Borough, except such *Towns* as ought to an-
 ſwer in the *Eyre* by twelve Men.

CHAP.

C H A P. VIII

Of some Privileges relating to Gavelkind Lands in Kent, now obsolete.

Of Exemption
from serving
on Juries in
Attaints.

• Peramb.
568.

BY Statute 15 H. 6. 5. Persons were not to be compelled to serve on Inquests in Attaints, by Reason of Lands which they held of the Tenure of Gavelkind. But this was rather a Confirmation of an old Privilege under the Common Law, than (as Mr. *Lambard* * seems to imagine) a new Grant; for the *Venire* for the Trial of Issues in Attaints is for *Viginti quatuor Milites*, which can scarce comprehend Gavelkind Tenants. Indeed tho' the Writ be so, it seems the Sheriff may return Gentlemen, and call them Knights; and it is not traversable whether they be Knights, or no. *Brv. Droit*, 18.

But whether this was a Privilege by Common Law or Statute, is not material, it being now taken away by 18 H. 6. 2. which takes Notice of the Inconvenience occasioned by 15 H. 6. for that seeing within the County of *Kent* there were but 30 or 40 Persons at most, who had any Lands or Tenements out of the Tenure of Gavelkind, because the greater Part of the said County, or well nigh all, was of the Tenure of Gavelkind, these Persons were to their great Impoverishment continually impanelled in the

the said Actions; and therefore this Statute Chap. VIII.
 enacts, that those who have to their own Use, or to whose Use others have, twenty Pounds a Year of the Tenure of Gavelkind, should for the Future be returned and impanelled in all Attaints.

In 16 *Ed. 2. Fitzb. Prescription, 52.* it is pleaded to be the Usage of Gavelkind, that no Man shall have Common in Land of that Nature. But, as Mr. *Lambard, Peramb. 119.* properly observes, the contrary is well known in *Kent* at this Day, and that in many Places. Of Common in Gavelkind Lands.

There was likewise another Custom, somewhat similar to the former, concerning Common in Gavelkind Lands in *Kent*, found by Verdict in the Case of *Thomas of Feversham, 17 Ed. 2. Mayn. 508.* That notwithstanding a Man and his Ancestors, whose Estate he has, have Time out of Mind had Common in Gavelkind Lands, the Lord of the Soil may enclose at his Discretion, and hold it in Severalty. And in that Case Damages were given against the Commoner for destroying a Trench cast up by the Lord on such an Occasion. But I take the Usage to be contrary at this Day.

In *Fitzb. Prescription, 52.* above-mentioned, it is likewise pleaded to be the Usage in Gavelkind, that if a Man finds the Cattle of another doing Damage on his Land, he may lawfully enchain and drive them off without impounding them. Which Mr. *Lambard, Peramb. 119.* observes to be Of driving off Cattle found Damage-fesant on Gavelkind Lands.
 yet

Book II.

yet the Practice, though he thinks it directly contrary to the Rule of the Common Law.

But it is certain, this is not a Usage peculiar to Tenants in Gavelkind, but a Liberty, which the Common Law allows to every Man: And so it was in *Tyrringbam's Case*, 4 *Rep.* 38. *b.* resolved, as the Book says, without Difficulty, that when the Cattle of a Stranger come into a Man's Land, and do Trespass there, the Owner may, with a little Dog, chase them out, and shall not be compelled to distrain them *Damage-fesant*. And the same Point is adjudged *Poph.* 161. in the Case of *Millen* and *Fandrye*.

Of the Lord's
Right to the
Trees in
Drovedennes,
by the Custom
of Gavel-
kind.

I have met with, on Record, a Custom of Gavelkind peculiar to the *Weald* of *Kent*, of which I find no Mention in any Book, viz. That the Lords, of whom the *Drovedennes* in the *Weald* were holden in Gavelkind, should have all the great Oaks, Ash, and Beech growing in such *Drovedennes*, together with the Pannage thereof; and the Owners of the Soil, only the Underwood, or at most the Oak, Ash and Beech, under forty Years Growth: Which Custom may properly be introduced, and the Original thereof explained by Mr. *Somner's* Account of the Nature of these *Drovedennes*, being in Substance as follows:

Vid. Lamb.

Peramb. 211.

The *Weald* of *Kent* was, for a great while, nothing but a Desert and unpeopled Wilderness, called *Silva Regalis*, as appertaining to the King, and acknowledging no private Lord

Lord or Proprietor: And it was usual in Chap. VIII. antient Royal Donations of Manors lying out of the *Weald*, to render the Grant more compleat by an additional Privilege of Common of Pannage [*i. e.* a Liberty of keeping and fattening Hogs with the Mast of the Trees] in one or more * *Dens* in the *Weald*. Which Term *Denne* signified a woody Valley, or Place yielding both Covert and Feeding for Cattle, especially Swine: And these *Denns* set out for the Agistment of Hogs and other Drovers of Cattle, were thence called * *Drovedenns*, and he that had the Custody and driving of them to and fro, (the Hogherd or Neatherd) *Drofmannus*. And there is scarce an antient Grant in either the Church of Canterbury's, *St. Austin's*, or *Rochester's* Registers, of any considerable Portion of Land, without the Addition and Attendance of such a Liberty. *Somn. Roman Ports and Ports in Kent*, p. 107. *ubi fusius*. And it is probable these Grants conveyed not only the Pannage, but the Property of the Trees themselves, the Lord being equally entitled to both, as appears by the following Records.

Trin. 7 Ed. 3. coram Rege. Rot. 55. Kanc.
In an Action of Trespass brought by *James de Echyngbam*, against the Prior of *Christ-church, Canterbury*, and others, for entering cutting Trees,
M m his &c.

* *Vid. Somn. Sax. Dict.* under the Word *Drof-denne*; and his Treatise on Gavelkind 117. *Co. Litt.* 4. b. says, *Drofsden, Drufden* or *Druden*, signifies a Thicket of Wood in a Valley: For *Druf* or *Dru*, signifies a Thicket of Wood, and *Den* a Valley. It is called in *Domesday*, *Dena sylva*; as see in *Spelm. Gloss.* under the Word *Dena*.

Book II.

The Defen-
dant pleads,
That the Place
where, &c.
is a *Drovedenn* holden
of him, and
that by the
Custom of
Gavelkind
the Lord is en-
titled to the
great Oaks,
Ash, and
Beech.

Plaintiff re-
plies *de inj.*
suâ prop. &c.

Issue.

Trespass for
cutting down
Trees, &c.

his Close at *Benynden*, and cutting down and
carrying away his Trees, to wit, such a
Number of Oaks, Ashes, and Beeches, which
grew in the said Close; ‘ *Quoad prædictas*
‘ *quercus, fraxinos & fagos, prædictus Prior*
‘ *dicit, quòd locus ubi, &c. vocatur Knolle,*
‘ *in quo loco est quidam Drovedenne, qui*
‘ *de ipso Priore immediatè tenetur, & di-*
‘ *cit, quòd omnes Domini, de quibus les*
‘ *Drovedennes tenentur immediatè, juxta Con-*
‘ *suetudinem patriæ de Gavelkynd habere de-*
‘ *bent, & a tempore quo, &c. habere consueve-*
‘ *runt omnes grossas quercus, fraxinos, & fagos*
‘ *crescentes in Drovedennes; & Domini soli*
‘ *illorum Drovedennes subboscum in eisdem*
‘ *crescens habere debent, & habere con-*
‘ *sueverunt: Et quia prædictus Drovedenn*
‘ *apud Knolle de prædicto Priore immediatè*
‘ *tenetur, ipse prædictis die & anno, &c.*
‘ *secundum Consuetudinem patriæ usitatæ de*
‘ *Gavelkynd, eundem Drovedenn intravit, &*
‘ *grossas quercus, fraxinos & fagos in eodem*
‘ *crescentes, ut arbores suas proprias, in formâ*
‘ *prædictâ succidit & asportavit, &c. prout*
‘ *ei bene licuit, &c.*

‘ *Et Jacobus dicit, quod prædictus Prior de*
‘ *injuriâ suâ propriâ arbores suas proprias in*
‘ *proprio solo crescentes, & non arbores ipsius*
‘ *Prioris, &c. modo quo idem Prior superius*
‘ *allegavit, &c. succidit, &c. Ideo veniat*
‘ *inde Jurata, &c.*

Pasc. 44 Ed. 3. Coram Rege. Rot. 36.

Kanc. ‘ *Thomas Bakere de Cranebrok atta-*
‘ *chiatus fuit ad respondendum Priori Ec-*
‘ *clesiæ Christi Cantuar. de placito quare vi*
‘ *& armis clausum ipsius Prioris apud Crane-*
‘ *broke*

‘ broke fregit, & arbores suas ad valenciam
‘ viginti librarum succidit & asportavit, &
‘ alia enormia, &c. Et unde idem Prior
‘ queritur, &c. Chap. VIII.

‘ Et prædictus *Thomas* venit & defendit
‘ vim, &c. & quoad fractionem clausi dicit,
‘ quod ipse in nullo est culpabilis. Et quoad
‘ succisionem arborum, &c. dicit, quod so-
‘ lum in quo, &c. est solum ipsius *Thomæ*,
‘ in quo solo ipse arbores prædictas succidit
‘ & asportavit, sicut ei bene licuit, &c. un-
‘ de petit iudicium, &c. The Defendant pleads, That the Place, where the Trees grew, was his own, &c.

‘ Et Prior, non cognoscendo solum præ-
‘ dictum fore ejusdem *Thomæ*, dicit quod
‘ solum illud est quidam locus vocatus *Omen-*
‘ *dennesbok*, infra dominium ipsius Prioris de
‘ *Cranbrok*, & est *Drofdenne*, & in quo
‘ loco, & aliis locis, ubi *Drofdenne* est infra
‘ dominium suum, ipse Prior & omnes Pre-
‘ decessores sui, Priores Ecclesiæ Christi Can-
‘ tuar. a tempore quo, &c. habuerunt, &
‘ habere debent omnes hujusmodi *quercus*
‘ & *fagos* in solo illo crescentes, pro volun-
‘ tate suâ succidendi & asportandi, una cum
‘ *pannagio* inde proveniente, & nullus alius;
‘ & quod omnes tenentes in solo prædicto
‘ reddunt dicto Priori pro *pannagio* illo
‘ quendam annuum redditum; & ex quo
‘ dictus *Thomas* cognovit succisionem & as-
‘ portationem arborum prædictarum, petit
‘ iudicium & damna sibi adjudicari, &c. The Plaintiff replies, That the Place is a *Drovedenne*; and he the Lord, &c. and prescribes for all Oak and Beech in the *Drovedens* within his Lordship, together with the Pannage.

Afterwards the Defendant pleads, That he is but Tenant for Life of the Premisses, and prays in Aid of them in the Reversion; but they not appearing at the Day given,

Book II. *Consideratum est quòd prædictus Thomas solus respondeat.*

Defendant re-joins, that the Owners of the Soil of the *Drovedens* are entitled to all the Trees under 40 Years Growth, &c.

‘ Et idem *Thomas* dicit, quòd Domini prædicti soli de *Drofdenne* habent, & habere debent omnimodas arbores de crescentiâ *quadraginta annorum* & *infra*, in solo illo crescentes; & dicit, quòd ipse est Dominus soli in quo, &c. in quo ipse *Thomas* succidit hujusmodi arbores de tali crescentiâ, &c. ad valentiam duodecim denariorum, sicut ei bene licuit; absq; hoc, quòd prædictus Prior hujusmodi arbores *de tali crescentiâ* ibidem habere debet; unde petit judicium, &c.

The Plaintiff says, That the Lord ought to have all Oak and Beech, of whatsoever Growth, &c.

‘ Et prædictus Prior dicit, quòd ipse habere debet omnes *quercus* & *fagos*, *cujuscunq; crescentiæ* fuerint, in prædicto solo de *Drofdenne* crescentes, &c. & sic dicit, quòd prædictus *Thomas* de injuriâ suâ propriâ, &c. & hoc paratus est verificare per patriam, & prædictus *Thomas* similiter; Ideo veniat inde Jurata, &c.’

And this Right of the Lord to the Trees in the *Drovedennes*, together with the Pannage, is acknowledged in a Roll of Pleas, 3 *Ed. 2.* before *William Inge* and his Companions, Justices of Oyer and Terminer, specially appointed ‘ ad inquirendum per sacramentum proborum & legalium hominum de Com. *Kanc.* qui malefactores & pacis perturbatores arbores *Roberti Archiepiscopi Cantuariensis* apud *Hachelwoldenne*, *Cranbrok*,’ and many other Places in the *Weald*, ‘ succiderunt & asportaverunt.’

And

And *Walter Lucas* and others, (being presented on the Oaths of the Inquest for Trespases of that Nature) ‘attachiati fuerunt ad respondendum prædicto Archiepiscopo de prædicto placito; unde idem Archiepiscopus per attornatum, &c. queritur quod prædicti *Walterus* & alii (*such a Day and Year*) arbores ipsius Archiepiscopi, viz. *quercus* & *fagos* ad valentiam quingenti librarum, &c. succiderunt & asportaverunt, &c.

Chap. VIII.

Trespas by the Archb. of Cant. for cutting down his Oak and Beech, &c.

‘Et *Walterus* & alii veniunt, & defendunt vim & injuriam, &c. & benè cognoscunt, quòd ipsi tenent terras & tenementa sua in prædicta Villa de *Hachekwoldenn* & *Mereden* de prædicto Archiepiscopo, & quòd arbores in prædictis terris & tenementis crescentes, una cum proficuo Pannagii, ratione Drovedenn sunt ipsius Archiepiscopi, sed dicunt, quod nullas arbores in prædictis boscis succiderunt, nec aliquam transgressionem ei fecerunt; & de hoc ponunt se super patriam, & prædictus Archiepiscopus similiter, &c.’ And the Jury find them guilty of the Trespas, and assess the Damages.

The Defendants confess that they hold their Lands of the Archb. and that the Trees thereon are his by reason of Drovedenn; but plead, that they cut none down.

Verdict for the Archb.

The following Pleadings are Part of the same Roll, and are a further Evidence that this Custom was looked upon as originally incident to Lands of the Nature of Gavelkind.

Nich. Aucher and *Bertran de Wylmynton* were in like Manner attached to answer the same Archbishop, for cutting down and carrying away his Trees growing in *Cranbrok*, *Hachekwoldenne*, *Rolvynden* and *Meredenn*, viz. *Quercus* & *fagos* ad val. quingenti librarum.

Trespas by the Archb. for cutting down his Oak and Beech.

The

Of Customs relating to

Book II.

The Defendants plead,
That the Lands where,
&c. were formerly Gavelkind, but converted to Knights-service by the Grant of a Predecessor of the Archbp's.

The Defendants plead, ' Quòd prædictus Archiepiscopus injuste queritur, &c. dicunt enim, quòd *Will'us de Cassingbame*, avus *Petronillæ* uxoris ipsius *Nicholai*, & *Benedictæ* uxoris prædicti *Bertrani*, quondam tenuit centum & viginti acras terræ cum pertinentiis in *Rolindenne* in *Gavelikend* de prædecessoribus ipsius Archiepiscopi: Et quòd *Sanctus Edmondus* quondam Archiepiscopus *Cantuar.* prædecessor prædicti Archiepiscopi, concessit prædicto *Will'mo de Cassingbame* prædictas centum & viginti acras terræ, quas de ipso Archiepiscopo tenebat prius in *Gavelykende*, quòd eas haberet & teneret sibi & hæredibus suis de ipso *Sancto Edmondo* Archiepiscopo, & successoribus suis, liberè & quietè per servitia vicesimæ partis feodi unius militis, & decem solidorum & duorum denariorum per annum, & quòd idem *Will'us* & hæredes sui haberent eandem libertatem in eadem terrâ, quam habent alii Milites de feodo Ecclesiæ *Cbristi Cantuar.* per quoddam scriptum, quod proferunt in hæc verba, &c.'

Vid. ante 52.

John to *Hubert* Archbishop of *Canterbury*, empowering him and his Successors to change the Tenure of Lands holden of them from Gavelkind to Knight-service, and then grants to *William de Cassingbame*, to the Effect above: ' Unde dicunt, quòd prædictus

And that since that Time the Owners of the Lands constantly felled the Trees.

Will'us de Casyngbam, post concessionem prædictam, totâ vitâ suâ arbores in prædictâ terrâ crescentes pro voluntate suâ succidit & asportavit: Et post mortem ejusdem *Will'i* quidam *Radulphus*, filius ejus, similiter

‘ liter succidit & prostravit pro voluntate
 ‘ suâ ; post cujus mortem ipsi *Nicholaus* &
 ‘ *Bertranus*, ratione prædictarum *Petronillæ*
 ‘ & *Benedictæ* filiarum & hæredum præ-
 ‘ dicti *Radulphi*, quas duxerunt in uxores,
 ‘ similiter succiderunt & prostraverunt, sicut
 ‘ eis benè licuit ; & quòd ipsi nullas arbores
 ‘ ipsius Archiepiscopi in prædictis centum
 ‘ & viginti acris terræ, nec alibi, succide-
 ‘ runt nec asportaverunt : Et de hoc se
 ‘ ponunt super patriam. Proferunt etiam
 ‘ quandam confirmationem Ecclesiæ *Christi*
 ‘ *Cantuar.* quæ prædictam concessionem
 ‘ testatur.

‘ Et Archiepiscopus dicit, quòd ante præ- The Archbp:
 ‘ dictam concessionem prædicti *Sancti Ed-* replies, That
 ‘ *mundi* prædecessoris sui, & post, arbores in before and
 ‘ dictâ terrâ crescentes semper fuerunt præ- since the said
 ‘ decessorum ipsius Archiepiscopi, & similiter Grant the
 ‘ suæ prostrandæ pro voluntate suâ ; absq; hoc, Trees there
 ‘ quòd prædicti *Willus de Casynghame*, aut growing have
 ‘ *Radulphus* filius ejus unquam aliquid de eis been the
 ‘ dem succiderunt, quousq; prædicti *Nicholaus* Archbishop's ;
 ‘ & *Bertranus* de injuriâ suâ propriâ arbores and traverses,
 ‘ ipsius *Roberti* Archiepiscopi, tam in præ- that the Ow-
 ‘ dictis centum & viginti acris terræ, quàm ners of the
 ‘ alibi crescentes vi & armis succiderunt & Land have
 ‘ asportaverunt ; & de hoc se ponit super pa- used to fell
 ‘ triam : Et *Nicholaus* & alii similiter. them.

Issue.

‘ Postea, &c. veniunt *JURATORES*, Verdict, That
 ‘ qui dicunt super sacramentum suum, quòd the Archbi-
 ‘ *quercus* & *fagi* in prædictis centum & vi- shops have al-
 ‘ ginti acris terræ *sunt arbores ipsius Archi-* ways felled
 ‘ *episcopi*, & quòd ipse & prædecessores sui the Trees
 ‘ a tempore, cujus non extat memoria, pro- without Let of
 ‘ sternere solebant arbores in prædictâ terrâ the Owners,
 ‘ crescentes

Book II.

And have taken Amends for any Trespas done to them,

And have taken the Pannage.

Judgment accordingly.

‘ crescentes, & vendere pro voluntate suâ,
 ‘ absq; impedimento sive calumpniâ præ-
 ‘ dictorum *Nicholai & Petronille, Bertrani*
 ‘ & *Benedictæ*, aut antecessorum suorum : Et
 ‘ si aliqua transgressio facta fuit in prædictis
 ‘ boscis per prædictos *Nicholaum & Bertra-*
 ‘ *num*, vel per quoscunq; alios, idem Archi-
 ‘ episcopus & prædecessores sui inde cepe-
 ‘ rint emendam : Et dicunt, quòd prædeces-
 ‘ sores ipsius Archiepiscopi, & ipse similiter,
 ‘ semper hucusq; percipere solebant, & ad-
 ‘ huc idem Archiepiscopus percipit medietatem
 ‘ totius *Pannagii* in boscis prædictis :
 ‘ Dicunt etiam, quòd prædictus *Nicholaus*,
 ‘ &c. sexaginta querctus & fagos, crescentes
 ‘ in prædictâ terrâ, vi & armis prostraverunt,
 ‘ ad damnum ipsius Archiepiscopi centum & decem librarum, &c.’ And there-
 upon Judgment is given for the Arch-
 bishop.

There remain indeed at this Day no Footsteps of this Right; the Reason whereof is well accounted for by the following Passage of Mr. *Somner*, from the Place above-cited.

Roman Ports,
&c. in Kent,
 112.

In the Times of *Edward* the Third and *Richard* the Second, the then Archbishops of *Canterbury*, and the Prior and Convent of *Christchurch* respectively, amongst other like Lords and Owners of the *Wealdish Dens*, finding themselves aggrieved by their Tenants there and others, in cutting down and wasting their Woods, which, on former Feoffments, they had expressly reserved from their Tenants to themselves (tho’ it is more probable their Title to them was from the above-men-
 tioned

tioned Custom) in order to free themselves from further Care and Trouble in that Matter of the Wood, entred into a Composition with their Tenants; and for a new annual Rent of Assize over and above the former Services, by Indenture of Feoffment, (many of which relating to the Archbishop and Monks the Author had seen) made the Wood over to them in Perpetuity, either to be cut down, or left standing, at the Tenant's Choice. Ever since which Time the Interest of the Lord so compounding, has been gone as to the Wood it self, and nothing left but this Rent of Assize, together with the former Services.

And a Custom of a contrary Nature is set up at present in most Manors of, if not throughout the whole *Weald*, under the Name of * *Landpeerage*; whereby the Owners of the Lands, on each side the Highways, claim to exclude the Lord from the Property of the Soil of the Way, and of the Trees growing thereon.

* i. e. *Landownership*:

Of Customs common to

CHAP. IX.

Of Customs common to all Kentish
Men.

HAVING now gone through the several Customs of Gavelkind, I shall, before I conclude, take Notice of some Customs claimed in our Books, or on Record, as the Right of all *Kentish* Men in general, and not particularly appropriated to Tenants in Gavelkind.

Whether
there be a
Custom for
Kentish Fisher-
men to fix
Stakes on the
Shore.

In Trespass for digging the Plaintiff's Ground, the Defendant justified under a Custom, that all the Men of *Kent* have, Time out of Mind, when they fish in the Sea, used to dig in the Lands adjoining, to fix Stakes there for drying their Nets. And it was agreed, that by the Common Law those who fish in the Sea may justify coming upon the Land adjoining to the Sea; for such Fishery is for the publick Good, and for the Sustainance of all the Subjects of the Realm: But there was a Doubt in the Court, whether the Custom to dig was good, as being in Destruction of the Inheritance. 8 *Ed.* 4. 18. *b.* *Bro. Custom*, 46. The Case is not finally determined in the Book, but the Modern Practice may decide the Question against the Custom; for they who fix Stakes on the Shore betwixt high and low Water-marks, for the Use of their Kidel-Nets, now pay an Acknowledgment for the same to the Lord of the Manor.

8 *Ed.* 4.

8 *Ed.* 4. 23. *a.* It is pleaded to be the Custom of *Kent*, that when Enemies come to the Sea-Coast, it is lawful for all them of *Kent* to come on the Land adjoining to the Coasts, and there to raise Bulwarks for the Defence of the Country. But this is certainly the Common Law of the Realm; Necessity and the Safety of the Publick justifying the Damage done to private Property. 21 *H.* 7. 27. *b.* 12 *Rep.* 12.

Chap. IX.

Custom of
Kent to raise
Bulwarks in
alieno solo a-
gainst En-
emies.

In the seventh Year of *Edw.* 3. before the Presentment of *Engleschire* was taken away by Statute, and when the Law required, for the Safety of Foreigners, that every Person slain should be proved by his Relations to have been of *English* Birth, otherwise the Country were amerced for his Death, if the Murderer were not taken in due Time; the County of *Kent* claimed before the Justices in *Eyre*, to be exempt from the Peril of this Law; but because this Claim was notoriously false, they were fined for it. *Itin. Kanc.* 7 *Ed.* 3. *Plac. Coron. Rot.* 1. *in principio.*

Of *Engle-*
schire.

Vide Stat.

14 *Ed.* 3.

* TOTUS COMITATUS
præsentat, quòd nulla *Englescheria* præsen-
tatur in Comitatu isto: Et quia comper-
tum est per Rotulos ultimi Itineris, &
etiam per Rotulos de aliis Itineribus præ-
cedentibus, quòd *Englescheria* præsentatur
in Comitatu isto de Feloniis tantum, &
hoc de masculis, & per duos ex parte pa-
tris vel matris, ad judicium de TOTO
COMITATU.

N n 2

ferent

* For the Signification of this Expression, see be-
fore 260.

Book II. ferent from what it was in several other Counties; for *Bracton* says, *in quibusdam Com. presentatur Englescheria, sive mortuus fuerit masculus, sive foemina, per duos masculos ex parte patris, & per duas foeminas ex parte matris, &c.* Lib. 3. c. 15. p. 135.

Kentish Men
exempt from
Villanage.
Lamb. Per-
amb. 9.

The *Kentish Customal* claims, that the Bodies of all *Kentish Men* be free, as well as the other Free Bodies of *England*: Which was formerly, while many of the Subjects of this Kingdom remained under a State of hereditary Bondage, a most glorious and valuable Birth-right. And the Claim appears to be well founded by 30 *Ed. 1. Fitzb. Villenage*, 46. In a Writ of *Niefse*, the Defendant pleaded, that she was free; and the Jury found, that the Father of the Defendant was born in *Kent*; whereupon, without further Inquiry, the Court gave Judgment that she was free, for that there were no Villeins in *Kent*. But tho' it was sufficient for a Man in order to avoid the Objection of Bondage, to say that his Father was born in *Kent*; yet *Mr. Lambard* ⁶¹²/₅₈₇, doubts whether it would serve in that Case to say only, that he himself was born in that County. But that Doubt is resolved by 7 *H. 6. 33. a.* Where it is said, that in the County of *Kent*, they have a Custom that every one born within the County shall be free, notwithstanding his Father was a Villein; and *Martin Justice* answers, that this is by Parliament, and a Statute made for that Purpose. And it is the more probable this Privilege might have such Commencement, because *Mr. Somner* has shewn beyond Contradiction

dition by several ancient Records, &c. Chap. IX.
that there have been Villeins in *Kent* since the Conquest.

There remains another Privilege formerly claimed by the Men of *Kent*, redounding so much to the Honour of our County, that I cannot pass it over in silence, though possibly not altogether proper for a Treatise of this Nature: It is that of being placed in the Van-guard of the King's Army. Which Right, together with the Occasion of it, is taken Notice of by an Author who wrote about the Time of *Hen. II.* ' * *Enudus* ' *quantâ virtute Anglorum, Dacos, Danosq;* ' *fregerit, motusq; compescuerit Noricorum,* ' *vel ex eo perspicuum est, quòd ob egregiæ* ' *virtutis meritum, quam ibidem potenter* ' *& patienter exercuit Cantia nostra, primæ* ' *cobortis honorem, & primos congressus ho-* ' *stium, usq; in hodiernum diem in omnibus* ' *præliis obtinet.*' *Joannis Sarisburiensis Policraticus, Lib. 6. c. 18.* And *Camden* in his *Britannia*, under *Kent*, from an ancient Monk † bears Testimony of the same Right.

† *Gervase. Lamb. Peramb. 14.*

Indeed the Difuse of the ancient Method of leading forth the Forces of this Kingdom according to their Counties, has caused a long Suspension of the *Kentish* Men's Right of being

* Others read *Cinidus*; Mr. *Selden*, in his Notes on *Drayton's Polyolbion ad finem*, thinks it should be *Cnudus* for King *Cnute*; but (with great Deference to him) that is repugnant to the Sense. I imagine it should be *Edmundus* (for *Edm. Ironside*, *Canute's* Antagonist) written in the old contracted manner *E_dm_dus*.

Of Customs common to, &c.

Book. II. being marshalled in the Front of the Battle:
 But whether, if future Times should revive the old Order, they may not still be entitled to their former Prerogative, I leave to the Decision of the Gentlemen of the College of Arms, as a Matter improper to be determined by one of a peaceful Profession; and hope I have done sufficient in continuing my Countrymen's Claim: But as the Honour is attended with some Danger, it may possibly be yielded to them without Dispute.

It is on Account of these two last mentioned Privileges that the Poet *Drayton* bestows this honourable *Elogium* on our County,

Polyalbien,
 Canto 18.

Of all the English Shires be thou surnam'd
(the FREE,
And FORE-MOST ever plac'd, when they
(shall reckon'd be.

THE

Various Read-
ings in *Tottel's*
Edition, 1556.

* T H E

Various Read-
ings in the
M.S. of Lin-
coln's Inn.

Custumal of K E N T;

From Mr. Lambard's Copy, with his
Translation.

The Title is
Consuetudines
Kancie.

The Title is
Constitutiones
Kanc.

* *Et les Cu-*
stoms omitted.

These are the usages, and Customes, the
Ces sont les usages, & les custumes, les*

* *Et les Cu-*
stoms omitted.

which the comunalty of Kent, claimeth to
ques le comunaute de Kent, cleiment
have

* As I have subjoined this *Custumal* to my own Work, it may possibly be expected that I should say something concerning the Nature and Authority of it; especially as the Latter has been attacked by Sir Henry Spelman, who in his *Treatise of Feuds*, c. 14. says that there are such Differences between *Tottel's* and *Lambard's* Copies, that both their Authorities may be questioned. But what Foundation there is for this Assertion, is left to the Judgment of the Reader, on the View of those Differences, which are here noted in the Margin.

I have not been negligent in my Endeavours to find out whether this *Custumal* be any where on Record. Mr. *Lambard's* Copy mentions that the Usages therein contained were allowed in *Eyre*, in the 21st Year of *Ed. 1.* It happens that the Records of that *Iter* are perfectly preserved, and I have perused them all, viz. the Chief Justice's (*Berewicke*) Roll, the *Rex* Roll, the Roll of the Pleas of the Crown, and the *Quo Warranto* Roll, but there is no such Record among them, nor among those of any other *Iter*: And the Language of the *Custumal* being different from that wherein the Proceedings before those Justices were Recorded, (which were ever
in

Customal of Kent.

habe in the Tenements of Gabelkind, &
 auer en tenementz de Gauylekendē, e
 in

in Latin,) leaves us little Reason to believe that it had it's Original there.

lo. f. 11. 33. Lord Coke gives it the high Appellation of
Statutum de Consuetudinibus Kancie, but, it
 seems, on no other Foundation, than that it is
 sometimes to be met with in old Collections of
 Statutes, as are many other Matters which were
 never enacted by Authority of Parliament, and
 is so Printed by *Tottel*; for I have examined
 the Parliament Rolls of the 21st Year of *Ed. 1.*
 (of which Date the *Customal* appears to be by the
 Conclusion) and those of the preceding and
 subsequent Years, being much the same as are
 published by *Ryley*, under the Name of *Placita
 Parliamentaria*, and it does not occur there.

I then hoped to have found it at the *Tower*,
 but on Enquiry was informed, that there was
 no such Record in that Office.

I have notwithstanding little Reason to lament
 my Search, since it first brought me to the
 Knowledge of those Records of the *Kentish Iters*,
 which are inserted in this Book, and going to al-
 most every Point of our Customs take away, in a
 great Measure, the Necessity of Authenticating
 the *Customal*; which I imagine rather to have
 been a private Collection of such Things as
 had been found *per totum Comitatum*, or were
 otherwise known to be the Custom of *Kent*, than
 a Record of a publick Nature: And the Words
 of Mr. *Lambard's* Copy, that these Customs
 were allowed before the Justices in *Eyre* in the
 21st *Ed. 1.* seem to favour a Conjecture that
 they might be extracted by Command of those
 Judges, from the Records of their Predecessors,
 for the Information of their own and future
 Times.

However, thus much may be said for the pre-
 sent Authority of the *Customal*, whether Au-
 thentick in its Original, or not, that it has re-
 ceived such a Sanction from its Antiquity, as to
 have been admitted in Evidence to a Jury, even
 from Mr. *Lambard's* Copy.

*Lannder and
 Brookes, Cro.
 Car. 562.*

Various Read. in the Men of Gavelkinde, * allowed in Various Read.
in Tottel's Edit. en gentz Gauilekendeys, * allowes en M.S.Linc.Inn.

* The Words Eire before John of Bertwike, & his com- * The Words
between the Eire John de Berewike, e ses com- between the
Stars omitted.

panions, the Justices in Eire in Kent, likewise the
pagnions, Justices en Eire, en Kent, following

the 21. peere of King E. the Sonne of *savoir que*
le. 21. an le Roy Ed. fitz. le toutes les cors
de Kenteyz,

Ding Henrie. * That is to say, that all are omitted,
Roy Henrie. * Cestascavoir, que toutes * and the Sen-
the bodies of Kentishmen be free, as well Soient frankz,
les cors de Kenteyz seynt francz, auxi come &c.

as the other free bodies of Englande.
les autres fraunz cors Dengleterre.

b The whole b * And that they ought not the Escheator * The whole
Passage con- Et que ilz ne dauient le eschetour Passage con-
cerning the of the King to chuse, nor eber in any time concerning the
Escheator o- le Roy elire, ne vnkes en nul temps Escheator o-
mitted.

did they: But the King shall take, or cause
ne fesoient, mes le Roy prengne, ou face

to be taken, such an one as it shall please
prendre, tiel come luy plerra,

him, to serbe him in that which shall be
de ceo qui soit mistier a luy

needful. And that they may their landes
seruir. Et quilz puent lour terres

and there tenements gebe and sell, with-
E lour tenementz * doner E vender, * Doner ou
Vender.

out licence asked of their Lordes: Sa-
saunz conge demaunder a lour seignerages:

bing unto the Lordes the rents and the
sauues a seignorages les rentz e les
serbices

Various Read. serbices due out of the same tenements. Various Read.
in Tottel's Edit. services dues des mesmes le tenementz. M.S. Linc. Inn.

And that all, and ebery of them, may by
Et que touz, e chescun, puseit per

writ of the King, or by plaint, plede for
* A son droit. *Bre' le Roy, ou per pleynt, pleder pur* * * A son droit.

the obtaining of their right, as wel of their
b Desouth. *leur droit purchaser, auxibien* b † de leur † Desouz.

Lordes, as of other men. And they
Seignerages, come des autres gentz. Et

claime also, that the communaltie of
c Auxibien de la common-
aunce de la *clament* c *auxi, que la Commune de*

Gavelkindmen, which hold none other than
Gauylekendeys, que ne tenent mes que

tenements of Gavelkinde nature, ought not
tenemenz Gauylekendeys, ne deiuent

to come to the common Summonce of the
venir a la commune Somonse del

Eire, but onely by the Borsholder, and
Eire, mes ke per Borgefaldre, &

four men of the Borowhe : except the
iiij. hommes * *de la Borghe : hors pris les* The Words
between the
Stars omitted.

townes, which ought to answer by twelbe
villees que deiuent responder per xij.

men in the Eire. And they claime also
hommes * *en le Eire. Et clament auxi,*

that if any tenant in Gavelkind be at-
que sil nul tenant en Gauylekend seit at-

tainted of felonie, for the which he suffereth
teint de felonie, per que il suffre

execution

Various Read. execution of death, the King shall have all Various Read.
in Tottel's Edit. † Iuyse * de mort, eit le Roy touz ses M.S. Linc. Inn.

• Fuise. his goods, & his heire forthwith after his † Iues.
chateux, e son eir maintenant apres sa

Death shall be inheritable to all his landes &
mort seit enherite de touz ses terres &

tenements which he held in Gabelkinde in
tenemenz, que il tient en Gauylekende en

fee, & in inheritance: & he shall hold them
fee, e en heritage: e les tiendra

by the same services & customes, as his
per mesmes les services et customes, sicome

auncestors held them: whereupon it is said
ses auncestres les tyndront: dont est dict

in Kentish: the father to the bough, and
*en Kenteis * † he fader to þe bough, and*

• Sonde the
Father to the
Bough, Sond
the Sonne to
the Plough.

the sonne to the plough. And if he have a
þe son to þe plogh. *Et si il eit* the Son to the
Londe.

wife, forthwith be she endowed by the
femme, maintenant seit dowe per le

heire, (if he be of Age) of the one halfe of all

• Sil soit del
Age a aver &
tèner solonc le
fourme a-
vaunt dit. Et de
celes terres le
Roy, &c.
(but falsely).

beir, † *sil seit dage, de la meytie, de touz* † Sile' soit
dage a aver &
the landes & tenements which her husband tenir solonc le
les terres e tenemenz que son Baroun fourme avant-
dit. Et de
held of Gabelkind nature in fee, to have celes terris le
tint de Gauylekend en fee, a auer Roy, &c.
(but falsely).

& to hold according to the forme hereafter
e a tener solonc la fourme de

declared. And of such lands the King
suthdyte. Et de tiels terres le Roy
O o 2 shall

* Perhaps it should be Justice de mort, for it will be difficult to fix
the true Signification of any of the other Words.

Various Read. shall not have the peere, nor wast, but only Various Read.
in Tottel's Edit. ne auera An ne wast, mes tant foulment M.S. Linc. Inn.

the goods, as is befoze said. And if any
les chateux, sicome il est auant dit. Et si

man of Gabelkind, either for felonie, or
nul Gauylekendeis pur felonie, ou

for suspicion of felonie, withdrato him out
pur Ret de felonie, se suthrei de la

Peace.

of the country, & be demanded in the
pees, e seit en counte demande

countie as he ought, & be afterward vt-
com il appent, e puis vt-

lawed: or put himselfe into the holy
lagbe: ou sil se met en seinte

Oue le
Reaume, o-
mitted.

De ses tene-
mentes e de

ses terres, ceo
que de luy sont
tenus, ensem-

blement, &c.
(but falsely.)

church, & abiure the land & the realme,
eglise, et foriure la terre

the King shall have the peere & the wast of
le Roy auera lan e le wast

his landes and of all his tenements, to-
ces terres, & de touz ses tenemenz,

gether with all his goodes and chattels:
ensemblement oue touz ces chateux,

So that after the peere and the day, the
issint que apres lan, e le iour, le plus

next Lord, or Lordes, shall have their
procheyn Seig. ou Seigneurs, eyent leur

Eschetes of those lands and tenements,
Eschetes de celes terres e tenemenz,

every Lorde that, which is immediately
chescun Seigneur ceo, que de luy est tenu

* The Words
oue le

Reaume, o-
mitted.

† De ces te-
nementz et de

ces terres, ceo
que de lui sont

tenus, ensem-

blement, &c.
(but falsely.)

Various Read. holden of him. And they claime also, that Various Read.
In *Tottel's Edit.* sans men. * Et clament auxi, que *M.S. Linc. Inn.*

if any tenant in Gabelkinde die, and be
si ascun tenant en gaulekende murt, et

an inheritour of landes and tenements in
seit inherite de terres e de tenemenz de

Gabelkinde, that all his sons shall part
Gaulekende, que touz ses fitz partent

* Mr. Sommer, p. 170. gives us from an ancient Copy of the *Customal*, formerly Registered in a Book belonging to the Abbey of St. *Austin*, Canterbury, another Clause, following the Words, est de lui tenu sans men, viz. *E si home ou femme seit felon de sei mesmes, que il sey mesmes de gre se ocye, le Roy aura le chatteux tuts, & nient le an ne le waft, mes le heir seit tantot enberite sans contredit, kar tout seit il felon de sey mesmes il neyt my atteint de felonye.* Thus in *Englisch*, *And if a Man or Woman shall be a Felon of him or herself, who shall kill him or herself, of his or her own Accord, the King shall have all the Chattels, and not the Year nor the Waste, but the Heir shall immediately inherit without contradiction, for tho' he or she be a Felon of him or herself, he or she is not attainted of Felony.* This has been omitted in later Copies (as I suppose) because no other than the Common Law. But I chose to take Notice of it, because I have found it to have been formerly disputed whether one *Felo de se* did not forfeit his Lands by the Custom of *Kent*.

For in 55 H. 3. *Itin. Kane. rot. 34. in dorso*, In Bar of an Assize it is pleaded that the Father of the Plaintiff *fecit Feloniam de se*, and that the Custom of *Kent* is such, that if a Man *faciat Feloniam de se*, his Sons can claim nothing in any Land whereof he died seised, nor his Wife her Dower, & *petit quod inquiratur per viros legales de Comitatu.* *Postea Totus Comitatus recordatur quod ille, qui facit Feloniam de se, non forisfacit terram suam.* And thereupon the Plaintiff has Judgment to recover his Seisin.

that

Various Read. that inheritance by equall portions. And Various Read.
in Tottel's Edit. cel heritage per ouele porcioun. Et M.S. Linc. Inn.

if there be no heire male, let the partition
* Partition. *si nul heir made ne seit, seit la ** partye* * Particion.

be made between the females, even as be-
seit entre les females sicome entres les
tween brothers. And let the messuage also
freres. Et la mesuage

be departed between them: but the harth
seit autreci entre eux departi, mes le

for fire shall remain to the youngest sonne,
* Ou al punee *astre domorra al pune,* † † The Words
omitted. *ou al punee*

or daughter: And be the value thereof
ou al punee, e la value seit de ceo omitted.

delibered to each of the parceners of that
liure a chescun des parceners de cel

heritage, from xl. feete from that Astre,
* Piece del. *heritage a xl. c pes de cel Astre,*

if the tenement will so suffer. And then
si le tenement le peut souffrir. Et donkz

let the eldest brother have the first choice,
* Frere, omit- *le eyne d § frere eit la primere electioun,* § Frere, omit-
ted. ted.

and the others afterward, according to
e les autres apres per degree.

their degree. Likewise of houses which
Ensement de mesons que

shall be found in such Messuages, let them
* En ses mains, *ferront trouets *** en tieus mesuages, soient* ** En ses
soient parties *mesons soient*
enter, &c. *be departed amongst the heires by equall parties enter,*
departye entre les heirs per ouele &c.

portions, that is to weete, by foote if
porcioun, Ceo est asavoir per peies si
need

Various Read. need be, Saving the Couert of the Aſtre, Various Read.
in *Tottel's Edit.* est miſtier, Sauue le couert del Aſtre *M.S.Linc.Inn.*

which ſhall remaine to the youngeſt ſon,
que remeynt al pune, ou al punee

or daughter, as is befoze ſaid: So ne-
ſicome il eſt auandiſt, iſſi que ne-

bertheleſs, that the youngeſt make reaſonable
* *Reasonable.* *quedont que le pune face* * * *renable* * *Reasonable.*

amends to his parceners for the part which
gre a ces parceners de la partye que

to them belongeth, by the award of good
a eux appent per agard de bone

men. And of the afozeſaid tenements,
gentz. E des auaunditz tenemenz

whereof one only ſuit was wont to be
dont vn ſoule Sute tant ſoulement ſoleit

made befoze time, be there not by reaſon
eſtre feit auant, ne ſeit per la reſoun

of the partition but one ſole ſuite made,
* *Particion.* *de la b partye fors vn ſoule ſute faite*

as it was befoze accuſtomed: But yet let all
ſicome ſoleit auant, mes que touz

the parceners make contribution to the
les parceners facent contribution na

parcener which maketh the ſuite for them.
celui que face la ſute pur eux.

In like ſort let the goods of Gavelkinde
Enſement ſeient les chateus de Gauyleken-

perſons be parted into three parts, after
deys parties en treis apres le

the funerals & the debts paid, if there
exequies e les dettes rendues, ſi il y
be

Various Read. be lawfull issue in life: So that the dead Various Read.
in Tottel's Edit. *ait issue mulier en vye, issi que la mort* M.S. Linc. Inn.

haue one part, and his lawfull sonnes and
 * The Words *eyt la vne partie, e les fitz* * * *e les filles* * The Words
e les filles omitted. daughters an other part, and the wife the *les filles* omitted.

muliers lautre partie, et la † *femme la* † *Femme en*
 third part. And if there be no lawfull *vie la tierce*
tierce partie. * *Et si nul issue mulier* *partie.*

issue in life, let the dead haue the one halfe, between the
en vie ne seit, ait la mort la meite, Stars are omitted.

and the wife alibe the other halfe. And
 * *Partie.* *e la femme en vye lautre* * *meytie* *. *Et*

if the heire, or heires, shall be under the
si le heir, ou lez heirs, seit, ou seyent de
 age of 15 peers, let the nourriture of them be
deins le age de xv. ans, seit la nouriture de

committed by the Lorde, to the next of the
 * The Words *eux baille* * § *per le Seig. al plus procheyn* § The Words
per le Seigneur omitted. bloud to whom the inheritaunce can not omitted.
 omitted. *del sank, a qui heritage ne peut*

descend. So that the Lord take nothing for
 * *Bailment.* *descendre, issi que le Seign. pur le* * *bail*
 the committing thereof. And let not the
rein ne prengne. *Et quil ne*

heire be married by the Lorde, but by his
 * *Son.* *seit marie per* * * * *le Seign. mes per sa* * * *Son.*

owne will, and by the aduise of his friends,
volunte demeine, § *per le conseil de ces amys*

if he will. And when such heire, or heires,
sil veut. Et quant cel heir, ou ceux heirs

shall come to the full age of fifteen peers,
sont de plener age de 15 anns
 4 let

Various Read. let their lands and tenements be delibred Various Read.
in Totte's Edit. seient a eux lour terres, e lour tenemenz M.S. Linc. Inn

unto them, together with their goods, and
livres, ensemblement oue lour chateaux, et
Profits

* Approwe-
ments.

with the emprowements of the same lands,
oue les ^a* enprowemenz de celes terres ^{*} Approwe-
mentz.

^a Raifonable.

remaining aboue their reasonable sustenance :

ou tre ^b † renable sustinance : † Resonable.

of the which profits & goods, let him be
de quel enprouement, e chateaux,

^c Lui avera
en noriture,
au qui le Seyg-
niour et ses
heyres cel
nouriture ave-
ra baillie.

bounde to make aunswere which had the
seit tenu a respondre celui qui de ^c luy § Lui avera en
education of the heire, or els the Lord, Seignour et
auera la noriture, ou le Seigneur ses heirs cele
or his heires, which committed the same baillie.
ou ses beires que cel noriture auera

education. And this is to be vnderstood,
baillie. Et ceo fet a sauoir

that from such time as those heires in Ga-
que del houre que ceux heirs Ga-

^d Averont
passe.

uelkind, be of, or have passed, the age of
uylekende ^d* † seient, ou ount passe le age de ^{*†} Averont
fifteen peeres, it is lawfull for them, their
xv. auns, list a eux lour
passe.

^e Doner ou
vender.

lands or tenements, to gibe and sell at their
terres ou tenemenz ^e †* doner e vendre a ^{†*} Doner ou
Vendre.
pleasure : Saving the seruices to the
lour volunte, Sauues les seruices au

^f Lour.

chiefe Lordes, as is before said. And if
^f* chesfz seignorages com il est deuant dit. ^{**} Lour.

any such tenant in Gavelkind die, and
Et si nul tiel tenant en Gaulekend meurt,
P p have

Various Read. habe a wiſſe that oberlibeth him, let that Various Read.
in *Tottel's Edit.* e eis femme que ſuruiue, ſeit cele *M.S. Linc. Inn.*

wiſſe by and by be endowed (of the one
femme maintenant douwe de la meite

halfe of the tenements whereof her Husband
des tenementz dont ſon baroun

died beſted and ſeiſed) by the heires, if

* The Words *moruſt* * *vestu e ſeiſi, per les heirs ſil* * The Words
vestu e omit- they be of age, or by the Lords, if the *vestu e omit-*
ted. *ſeient de age, * ou per les Seigneurs ſi les*

heires be not of age : So that ſhe may have
*heirs ne ſeint pas de age, * iſſi que ele eyt* The Words
between the
Stars omitted.

the one halfe moitie of thoſe lands and tene-
la meite de celes terres e tenemenz,

ments, to holde ſo long as ſhe keepeth her a
Et tiendra *a tener tant com ele ſe tyent veue,*
tant come ele
ſe tient veufue widow, or ſhall be attainted of childbirth,
oudeſenfantee, *ou de enſanter ſeit atteint*
de enfant ſoit
attaint, &c. after the ancient uſage : that is to ſay,
per le auncienne uſage, ceo eſt aſauoir,

that if when ſhe is delivered of childe, the
que quant ele enſaute, e

infant be heard crie, and that the hue and
lenfant ſeit oy crier, † E que le hu e le † Et la crie
ſoit leve, &
la pais ſe en- crie be raiſed, and the cuntry be aſſembled, la pais ſe en-
semble, &c. *cry ſeit leue e le pais enſemble,* ſemble, &c.

and have the view of the childe ſo bozne,
e eyent veue de lenfant enſi ſaute,

and of the mother, then let her loſe her
e de la mere, adonks perde ſon

Dowre wholly, & otherwiſe not, ſo long as
Dowre enterement, e autrement nyent,
ſhe

Various Read. the holdeth her a widow : whereof it is Various Read.
in *Tottel's Edit.* tant come ele se tient veue ; dont il est M.S. *Line. Inn.*

said in Kentish : he that doth wende her
* Sey is wedne *dist en Kenteis :* * * Je par hip pense, * Seye is
sey is levedne. let him lende her, And they claime also, ^{wedne, seye} ys lenedy.
Je hip lende. E clament auxi,

that if a man take a wife which hath in-
que homme que prent femme, que eit be-

heritance of Gavelkind, and the wife di-
ritage de Gauylekend, e la femme mur-

eth before him, let the husband have the one
ge auant luy, eit le Baroun le meite

halfe of those lands and tenements whereof
de celes terres et tenemens, tant come

he died seised so long as he holdeth him
⁊ Venfuer. El. il se tient ⁊ veuers (dont ⁊ il morust ⁊ Ele.

a widower, without doing any stricke,
seisei) saunz estrepement,

or waste, or banishment, whether there
ou wast, ou exile fere, le quel kil y eit

were issue between them or no : And if he
heir entre eux ou noun. Et sil

take another wife, let him loose all.
prent femme, trestout perde.

And if any tenement of Gavelkinde
Et si nul tenement de Gauylekend

do escheate (and that escheate be to any
eschete (⁊ ceo eschete seit a nul

Lord which holdeth by fee of Haverberke,
Seigneur que tiene per fee de hawberk,

Various Read.

in *Tottel's Edit.*

or by *Serieauncie*) by death, or by *Gauclate* *M.S. Linc. Inn.*
ou per seriauncye)* *per mort, ou per Gaue-*

The Words

between the

Stars omitted.

as is hereafter *saide*, or be to him between the
late sicome il est suthdite, * *ou li seit* Stars omitted.
giben up

rendred by his tenaunt which befoze held
rendu de son tenant que de li auant

it of him by quite claime thereof made, or
le tynt per quite clamaunce de ceo fete, ou

* Gavelet,

if his escheate be by *Gauclate* as is here-
seit sa eschete per * *Gauclate sicome il* * Gavtlete.

after *saide*, let this land remain to the
est de suthdit remeyne cele terre as

† Non porta-
 bles.

heires unpartable: And this is to be un-
beirs † *impartable. Et ceo fet asauoir*, † Noun por-
 tables.

derstood, where the tenant so rendring,
la ou le tenant ensi rendant,

The Words
 between the
 Stars omitted.

doth reteine no seruice to himselte, but
nule seruice retent devers sey, * *sauuet* The Words
saueth neberthelesse to the other Lordes between the
nequedent as autres Seigneurages Stars are o-
 mitted.

their fees, fermes, and the rents wherewith
fees, fermes e les rentes dont les

the aforesaid tenements of *Gabelkind*
auant diz tenemenz de Gauylekende

(so rendred) were befoze charged, by him,
ensirendus auant furent charges per ceux,

or them, which might charge them.
ou per celuy, que le charger poent, ou poyt *.

And they claime also, that if
E clament auxi, que si nul tenant
 withhold
 any tenant in *Gauelkinde* reteine his
en Gauylekende reteine sa
 rent,

Various Read. rent, and his seruices of the tenement which Various Read.
in *Tottel's* Edit. rent, e son seruice del tenement quil M.S. *Linc. Inn.*

he holdeth of his Lord, let the Lord seeke by
tient de son Seigneur, querge le Seig.

the award of his Court from three weekes
per agard de sa court de treys semeynes

to three weekes, to finde some distresse upon
en treys semeynes true destresse sur

that tenement, untill the fourth court,
cel tenement tant que a la quart court,

alwaies with witnesses: And if within
a rotet per testmoynage, Et si dedens

that time he can finde no distresse in that
cel temps ne trusse destresse en cel

tenement, whereby he may have iustice of
tenement per queux il puisse son tenant

his tenant, Then at the fourth court let it
iustiser, Donc a la quart court seit

be awarded, that he shall take that tenement
agard, quil pregne cel tenement

into his hande, in the name of a distresse,
en sa mein en noum de destress,

as if it were an oxe, or a cow, & let him
aussi come boef ou vache, e le tiene

keepe it a peere, and a day, in his hand
vn an, e vn iour en sa mein

without manuring it: within which terme,

^a Sans mein-
our.

^a * *fance meyn ouerir: dens quel terme,* ^{*} Sanz main-
nour.

if the tenaunt come, and pay his arrerages,
si le tenant vent, e rend ses arrerages,

^b Face raison- and make reasonable amends for the
ables amends e ^b *feit renables amends* † de la † De la dette
de la dette. with-

Various Read. withholding, Then let him have & enjoy Various Read.
 in Tottel's Edit. *detenue*, & *donc eit*, e *ioise* M.S. Linc. Inn.

his tenement as his aunccestors and he be-

*Les teignent. *son tenement sicom ses aunccestors* * * e ly *Les tenoient.

foze held it. And if he do not come be-

† Dedeys. *avant le tyndront. Et sil ne vent* † deu- † Dedeins.

foze the yeere, and the day past, then let

* Byt. *ant lan, e le iour passé, donc* * † auge † Aille.

the Lord go to the next countie court with

* Courte (but *le Seigneur al prochain* * Counte *suivant*
falsely.)

the witnesses of his owne court, & pro-
oue tesmoynage de sa court, e face la

nounce there this processe, to have further
pronuncier cel proces pur tesmoynage

witnesse. And by the award of his court
auer : *Et per agard de sa court,*

(after that countie court holden) he shall
apres ceo * Counte *tenue, entra*

* Court.

enter, and manure in those lands and

† Mainera. *e* * † meynouera *en celes terres* e * † Meignera.

tenements, as in his owne demeanes.
tenemenz, sicome en son demeyne.

And if the tenant come afterward, and will
Et si le tenant vent apres, e

rehave his tenements, and hold them as
voile ces tenemenz reaver e tener sicome

he did befoze, let him make agreement with
il fist devant, face gree al

the Lord, according as it is anciently said,
Seigneur, sicome il est auncienment dist,

* Neghe

Various Read.
in Tottel's Edit.

Various Read.
M.S. Linc. Inn.

* Neghe rybe relbe and neg he ryb
gelbe:
And fif pons for þe pepe, en þe bi-
come healþen.

* The Words
Aussi il cley-
ment omitted,
and the Sen-
tence runs
thus, Ne per
pueur del
Seigniour ne
des Baillifes
encountre sa
volunte sans
brieve le Roy
ne soit mis a
serment sinon
pour fealtie,
&c.

Also they claim that no Man ought
* Aussi il cleyment que null homme doit
to make Oath upon a Book (neither by
serment sur livre fare, per
distresse, nor by the Power of the Lord,
distress, ne per Poer de Seigneur,
nor of his Bailife against his Will, with-
ne de Bailif encountre sa volunte,
out the Writ of the King (unless it be
saunz bres le Roy (sinon per
for fealty to be done to his Lord)
Feaute fere a son Seigneur)

* The Words
Aussi il cley-
ment omitted,
and the Sen-
tence runs
Ne pur poure,
&c. as in
Tottel's Edi-
tion.

but

* i. e. Hath he not since any thing given,
and hath he not since any thing paid? then
let him pay five Pounds for his Were, or
Amercement, before he become Tenant or
Holder again.

But some Copies have the first Verse thus,
Nigon fithe seld, and Nigon fithe gelde, i. e.
Let him nine Times pay, and nine Times
repay. Lamb. Peramb. 553. And as to this,
vide ante pag. 249. Itin. Canc. 21 Ed. 1. rot. 23.

Tottel's Edition reads these Verses,
Neighe fithe yeld, Neighe fithe gelt,
and yef [i. e. give] you for the were, than is he
holder.

And the M. S. of Lincoln's Inn still differently,
Nenghe fyche zelde, wenge fit geld,
And xis Pund for the Were, yan is he haldere.

Various Read. but only before the Coroner or other Various Read.
 in Tottel's Edit. *meske per devaunt Coroner, ou auter M.S. Linc. Inn.*

The Words
 between the
 Stars omitted. Minister of the King, as hath Royal Pow-
*Minister le Roy, * qui Real poer eyont* The Words
 between the
 Stars omitted. er to enquire of Trespas committed a-
de Enquirer de trespas fet encountre le

gainst the Crown of our Lord the King.
*Coronne nostre Seigneur le Roy *.*

And they claime also that every Kentish
E cleyment auxi que checum Kentey's

* A Seignour added. Man may esloin another either in the King's
*put autre assonier * en la Court le Roy,* * A Seignour,
 added.

Court, or in the County or in the Hundreth,
en Counte, en Hundreth,

or in the Court of his Lord, where es-
e en la Court son Seigneur, la ou as-

soine lieth, and that as well in the Case
soigne gist, aussi bien de commune

of commune sute as of Plea. Moreover
sute come b † de play. Estre † De com-
 b De common Plee. mune Plee.

they claime by an especial Deed of King
ceo il cleyment per especial Fet le Roy

The Words
 between the
 Stars omitted. Henrie the Third, Father of King Edward,
*Henrie pere le Roy Edward, ** The Words
 between the
 Stars omitted. which now is (whom God save) that of the
*que ore est, que Dieu garde, * que de*

tenements which are holden in Gabelkinde
tenementz que sont tenus in Gavylekende

c The Words
 Battaille ne
 omitted. there shall no Battail be joined, nor grand
*ne seit prise c § Battaille, ne graunde § The Words
 Battaille ne*
 omitted.

Assise taken by xii. Knights, as it is used
Assise per xii. Chivallers, sicome aillours
 in

Various Read. in other Places of the Realme : that is to Various Read.
in Tottel's Edit. *est prise en le Reaume : ceo est a* M.S. Linc. Inn.

meet, where the Tenant and Demandant
savoir, la ou Tenant e Demaundant

hold by Gabelkinde : But in Place of
tenent per Gavylekende : Mes en lu de

these graund Assises let Juries be taken
ces graund Assises soient prises Jurees

by xii. Men being tenants in Gabelkind :
per xii. homes tenantz en Gavilekend :

so that four tenants of Gabelkinde choose

* *Issi que quatre tenantz de Gavilekend* The Words
between the
xii. tenants of Gabelkinde to be Jurors, Stars omitted.
elisent xii. tenantz de Gavylekende Jurors.

And the Charter of the King of this espe-
E la Chartre le Roy de ceste espe-

cialtie is in the custody of Sir John of
ciaute est en la garde Sire Johan de

Roxwood, the Day of St. Alphey in

* Norward. * *Norwode le Jour de S. b * Elphegh en * Elphe.*
b Elphe.

Canterburie the yeare of King Edward, † Lan le
Canterbyre, † *le an le Roy Edward,* reigne le Roy
Edward xxi. the Sonne of King Henrie the xxi. *Edward xxi.*
le Fiz le Roy Henrie xxi.

† These be the Usages of Gabelkind,
Ces sont les Usages de Gavylekend,

† N. B. Neither the M. S. of Lincoln's Inn,
nor Tottel's Edition have this Conclusion, and it is
repugnant to the last Privilege, which is claimed
under the Charter of King Hen. 3.

Various Read. and of Gabelkinde Men in Kent, which Various Read.
 in *Totes Edit. e de Gavylekendeys en Kent, que M.S. Lint. Inn.*

were before the Conquest, and at the
furent devaunt le Conquest, e en le

Conquest, and ever since till now.
Conquest e totes hores jekes en ca.

The Names of those Persons
whose Lands in *Kent* are
disgavelled by Acts of Par-
liament.

11 *H. 7.*

Sir Rich. Guldeford.

15 *H. 8.*

Sir Henry Wiat.

31 *H. 8. c. 3.*

Tho. Lord Cromwell,

Tho. Lord Burghe,

Geo. Lord Cobham,

*Andrew Lord Wind-
fore,*

* *Sir Tho. Cheyne,*

Sir Christ. Hales,

Sir Tho. Willoughby,

* *Sir Ant. Seintleger,*

* *Sir Edw. Wootton,*

Sir Edw. Bowton,

* *Sir Roger Cholm-
ley,*

Sir John Champneys,

* *John Baker Esq;*

Reignold Scot,

* *John Guldeford,*

* *Tho. Kemp,*

Edw. Thwaites,

* *William Roper,*

Ant. Sandes,

Edw. Isaac,

Percival Harte,

Edw. Monyns,

Will. Whetnall,

John Fogg,

Edm. Fetiplace,

Tho. Hardres,

Will. Waller,

* *Tho. Wilford,*

* *Tho. Moyle,*

* *Tho. Harlakenden,*

Godfrey Lee,

* *James Hales,*

Henty Huffey,

Tho. Roydon.

2 & 3 *Ed. 6.*

* *Sir Tho. Cheyne,*

* *Sir Ant. Seintleger,*

Sir Robt. Southwell,

* *Sir John Baker,*

* *Sir Edw. Wootton,*

* *Sir Roger Cholm-
ley,*

* *Sir Tho. Moyle,*

Sir John Gate,

*Sir Edm. Walsing-
ham,*

Qq 2

* *Sir*

Persons whose Lands disgabelled.

* <i>Sir</i> John Guldeford,	Tho. Harman,
<i>Sir</i> Humf. Style,	Tho. Lovelace,
* <i>Sir</i> Tho. Kempe,	Reignald Peckam,
<i>Sir</i> Martyn Bowes,	Herbert Fynche,
* <i>Sir</i> James Hales,	William Colepepper,
<i>Sir</i> Walter Hendley,	John Mayne,
<i>Sir</i> Geo. Harper,	Walter Mayne,
<i>Sir</i> Hen. Istey,	Tho. Watton,
<i>Sir</i> Geo. Blage,	John Tufton,
* William Roper,	Tho. White,
* Tho. Wylforde,	Peter Hayman,
* Tho. Harlakenden,	Tho. Argal.

Tho. Colepepper *of*
Bedgebury,

John Colepepper *of*
Ailesforde.

Tho. Colepepper, *Son*
of the said John.

Will. Twifenden,

Tho. Darrel *of* Scot-
ney,

Robert Rudstone,

Tho. Robertes,

Stephen Darrell,

Rich. Covarte,

Christ. Blower,

Tho. Hendley,

1 *Eliz.*

Thomas Browne, *of*
Westbecheworth *in*

Surrey,
Geo. Browne.

8 *Eliz.*

Tho. Browne *Esq;*

21 *Jac. 1.*

Tho. Potter *Esq;*

Sir Geo. Rivers *Knt.*

Sir John Rivers *Bart.*

N. B. Twelve of the Names in 2 & 3
Ed. 6. are the same as in 31 *H. 8. c. 3.*

A P P E N.

APPENDIX.

Of the Custom of Borough-English.

There being so strict an Analogy between the Customs of Gavelkind and Borough English, that according to the Opinion of Lord *Holt*, they differ but in Respect of the *Quantity* of the Land, that the Heir takes, and not in Construction; I found it necessary in the Course of the foregoing Treatise to take Notice of several Cases concerning Borough-English, the Reason of them serving for the Determination of some Points of the other Custom. And it may possibly render the Book more useful and compleat, if I here refer to those Cases, and insert what others are to be found in the Books relating to the same Custom.

But I shall first say something concerning the Name, Antiquity, and Reason of this Custom.

The Name itself guides us to judge of the Antiquity, and teaches us that this Custom had its Rise among the *Anglo-Saxons*: Indeed it is probable that it was not known by this Title, until the *Normans*, who were

Of the Name
and Antiquity
of Borough
English.
Bacon of Go-
vernment 66.
Co. Litt. 110.

Strangers b.

Of Borough-English.

Strangers to any such Kind of Descent in their own Country, on their Settlement in this Kingdom gave it the Name of *the Custom of the Saxon Towns*, to distinguish it from their own Law; and this may be collected from 1 Ed. 3. 12. a. Where it is said, that in *Nottingham* there are two Tenures, *Burgh Engloyes* and *Burgh Frauncoyes*, the Usages of which Tenures are such, that all the Tenements, whereof the Ancestor dies seised in *Burgh Engloyes*, ought to descend to the youngest Son; and all the Tenements in *Burgh Frauncoyes* to the eldest Son, as at Common Law.

The Reason of
this Custom.

Preface to
3 Mod. Rep.

Concerning the Cause and Original of this Custom there are two several Conjectures.

First, Some have imagined that it had its Rise in those Places, where formerly by the Custom of the Manor, the Lord was entitled to the first Night of the Bride of his Tenant, who held in Villenage: Which Right is now commuted for a Fine paid in many Manors on the Marriage of the Tenant; and particularly in the *Northern* Counties, who, it seems, drew this barbarous Usage from their Neighbours the *Scots*, among whom, by a Law of their King *Evenus* the Third, *Rex, ante nuptias, sponsarum nobilium, nobiles plebeiarum praelibabant pudicitiam.* Buchan. *Hist. Scot. Lib. 4.* Which continued to be the Practice till *Malcolm* the Third, *Uxoris precibus dedisse fertur, ut primam novae nuptiae noctem, quae proceribus per gradus quosdam lege Eveni debebatur, sponsus dimidiatâ argenti marcâ redimere posset: Quam pensionem adhuc Marchetas mulierum*

Of Borough-English.

lierum vocant, Buchan. *Hist. lib. 7.* A Term as well known to our Law for a Fine due to the Lord on the Marriage of the Son or Daughter of his Villein. *Co. Litt. 117. b. 140. a. Braet. lib. 2. f. 26.* And they suppose this Manner of Descent to have been introduced to prevent the eldest Son, who might be the Lord's, from inheriting the Estate. But, I believe, on Inquiry, it will be found that the Custom of Borough-English does not particularly obtain in those Manors where such Fine is paid: And this Reason, though perhaps sufficient to exclude the Eldest, would only, if taken in its full Force, convey the Inheritance to the second Son, as the next worthy, and not to the Youngest.

But the other Reason carries with it the greater Air of Probability, and is that given by *Littleton*; That the youngest Son, after the Death of his Parents, is least able to help himself, and most likely to be left destitute of any other Support; and therefore the Custom provided for his Maintenance by casting the Inheritance upon him. *Sect. 211. & 8 Ed. 4. 19. a. Crag. Jus Feud, lib. 1. tit. 11. sect. 10.*

And I am persuaded this will appear to be the true Reason, if we consider in what Places this Custom prevails; which are for the most part either antient Boroughs, or Copyhold Manors. In the former was exercised the little Trade that was antiently in the Kingdom, * which was not then in so flourish.

* The State of those Tradesmen was so low, that the Heir of any Tenant in Knight-Service (or Gentleman)

Of Borough-Engliffh.

flouriffing a Condition, that large Eftates could be raifed by it; a competent Maintenance, and a convenient Habitation, was all that the Tradesman could expect; as he was not rich himfelf, he could not bring up his Sons to Idlenefs; but found it moft for his own Eafe and their Benefit, as they feverally grew up, to fend them out into the World advanced with a Portion of his Goods, thereby enabling them to acquire their Living by Arts and Induftry. And for this Purpofe the old Law was very indulgent to the Son of a Burgefs, fupposing him to be of Age, *cum denarios discretè fciverit numerare, pannos ulnare, & alia negotia fimilia paterna exercere.* Glanv. lib. 7. c. 9. Bract. lib. 2. c. 37. f. 86. b. But as the youngelt Son was laft in Turn, he was the Child, if any, left unadvanced at the Death of his Father; and therefore the Custom prudently directed the Difcent of the Real Eftate (generally little more than the Father's-Houfe) where it was moft wanted. But becaufe it might happen that the youngelt Son was in his Father's Life-time placed out in as advantageous a Way, as the reft, to avoid any Inconvenience or Inequality, that might arife from an undue Preference to him, the Custom of moft Boroughs gave a Power unknown to the Common Law, of devifing the Tenements by Will.

Vide Litt. fecl.
167.

2. In

man) was looked upon to be difparaged, if married to the Daughter of one of them. *De Dominis, qui maritaverint illos, quos habent in Custodiâ, Villanis, vel aliis, ficut Burgenfibus, ubi difparagentur.* Stat. Mert. c. 6. Co. Litt. 80. Seld. in Hengham 111.

54

Of Borough-English.

2. In Copyhold Manors the Demesnes were generally divided among the Tenants in very small Parcels (as they still remain to this Day) and were holden on arbitrary Fines, large Rents, and hard Services; in-
somuch that these Estates, at that Time, were little more beneficial than Leases at Rack-Rents: And the Tenants themselves being Men of the meanest Sort and Condition, below the Hopes of breeding their Sons Gentlemen, the elder Part of their Family, at a proper Age, either applied themselves to Husbandry, or in those Manors where all the Demesnes were not already parcell'd out, might obtain Estates on the same hard Terms; and the small Advantage of the Father's Tenement was left to descend to the youngest Son, the only, tho' a mean Support of his Infancy.

Thus much may suffice concerning the Rise of this Custom.

There is no Difference between the Law concerning Copyholds in Borough-English, and Freeholds in Borough-English, as is agreed *Cro. Car.* 411. *Reeve and Malster.*

In what Places the Custom of Borough-English may be maintained, *vide ante pag.* 32.

The *general* Custom of Borough-English is, That the youngest Son shall inherit all the Lands and Tenements which his Father had within the Borough, &c. whether in Fee-simple or Fee-tail, *ante* 94. And shall have like Remedies for Lands entailed, as

R r

the

English.
1. General.
Lit. sect. 165.
Co. Litt.
110. b.

6
Of Borough-English.

the Heir at Common Law, but must count on the Custom, *ante* 106. and shall likewise enjoy all Lands of the same Nature, wherein his Father had but an Estate *pur auter vie* descendible, *ante* 97. But this Custom is strictly confined to the youngest Son, or his lineal Representative (if such Son die in his Father's Life-time) who shall take, tho' the Lands were purchased after the Death of such Son; *ante* 91, 92. but does not extend to the youngest Brother without a special Custom of the Place for that Purpose. *Ante* 93.

Of the Nature of this general Custom the Courts of Law will take Notice without pleading specially. *Ante* 38.

2. Special.

But we read in our Books of other *special* Kinds of Borough-English, of which the Law will take no other Notice than as they are specially pleaded. *Ante* 43.

Some of which restrain, and others extend the general Custom :

Of the first Sort are, 1. The Custom of a Manor in the Duchy of Cornwall, That an Estate in Fee in the Lands shall go to the youngest Son; but if in Tail, the Tenements shall descend to the Heir at Common Law : And this was held a good Custom in the Case of *Chapman and Chapman*, *March* 54.

Co. Litt.
140. b.

2. In 32. *Ed.* 3. *Age* 81. it is pleaded, That in the Soke of *B.* if a Man has several Sons by one Wife, the youngest shall inherit after the Death of the Father; but if he has two Sons by different Venters, then the Eldest

Of Borough-English.

dest shall inherit to the Father, and not the Youngest. And this Custom is there allowed good.

Those more extensive than the general Custom, are,

1. That if the Tenant has no Sons, but several Brothers, his youngest Brother shall inherit. *Co. Litt. 110. b.*

2. That the youngest Sister shall inherit. *Co. Litt. 140. b.*

Borough-English cannot begin by the King's Grant at this Day. *Ante 52.*

The Custom is not destroyed by Alteration of the Tenure of the Land. *Ante 65.*

It remains notwithstanding Unity of Possession in the Lord. *Ante 70.*

If Lands in Antient Demefne, descendible to the youngest Son, are rendred Frank-fee; yet the customary Descent remains. *Ante 73.*

Custom of Borough-English in Copyhold Lands remains, notwithstanding the Copyhold be severed from the Manor. *Ante 74.*

If a Person dies seised of a Remainder of Borough-English Lands, it shall descend as the Land in Possession. *Ante 78.*

The Use shall follow the Nature of the Land. *Ante 78.*

What Profits of a Fair or Market holden on Borough-English Lands shall follow the Nature of the Lands. *Vid. ante 79.*

What Rents or Common, out of Lands in Borough-English, shall follow the Nature of the Lands. *Vid. ante 79, 80, 81, 82, 83.*

8

Of Borough-English.

Tithes impropriate, issuing out of Borough-English Lands, shall go to the eldest Son. *Ante* 86.

The youngest Son shall have an Attaint or Writ of Error to reverse an erroneous Recovery of Borough-English Lands. *Ante* 107.

Cause of Entry by reason of Infancy, is not like to Conditions, Warranties, and Estoppels, which ever descend to the Heir at Common Law; but a special Heir shall take Advantage of the Nonage of the Ancestor; as if Tenant in Tail of an Acre of Borough-English makes a Feoffment in Fee within Age, and dies, the youngest Son shall avoid it; for he is Privy in Blood, and claims by Descent from the Infant. *Co. Litt.* 337. *b.*

If a Man seised of Land of the Nature of Borough English has Issue two Sons and dies, and the eldest Son, *before any Entry made by the Youngest*, enters into the Land by Abatement, and dies seised, this shall not take away the Entry of the youngest Brother; for the Law intends that the Eldest entred claiming the Land as Heir to his Father, and therefore the youngest Son and his Heirs may enter upon him and his Heirs in Respect of the Privy of Blood, and the same Claim by one Title. *Co. Litt.* 243. *a.*

The youngest Son being sued or suing during his Infancy for Borough English Lands descended to him, shall have his Age, or the Parol shall demur, as in the Case of an Infant Heir at Common Law. *Ante* 108.

If

Of Borough-English.

If a Man binds himself and his Heirs in an Obligation, and dies seised of Borough-English Lands, and Lands at Common Law, leaving two Sons, it seems they shall be sued in the same Manner, as if a Man has Lands by Descent on the Part of his Father, and others on the Part of his Mother, and dies without Issue of his Body; in which Case it is said, that the Obligee shall have *several* Actions against the Heirs, and not joint; and if one comes and shews the special Matter, yet Judgment shall be given against him, but the Execution against him shall cease, till the Obligee has recovered against the other, for that each having Lands by Descent, one shall not be charged with the Whole. 11 H. 7.

12. b. But this is only an *obiter* Opinion, and 2 Rep. 25. b. tho' it is certain that one Heir cannot be charged alone, yet if they are severally sued, it is 3 Rep. 14. a. difficult to conceive how one joint Writ of Execution can issue out of both Records. Hob. 25. On the other Hand there will be no Inconsistency, if a joint Action be brought against both Heirs charging, in the same Count, one as Heir at the Common Law, and the other as Heir in Borough-English; a Precedent of which is in *Brownl. Ent.* 180.

If a Man is seised of two Acres, one of the Nature of Borough-English, and binds himself in a Statute or Recognizance, or Judgment is given against him in Debt, and he dies leaving two Sons, the Land of one alone shall not be extended. *Ante* 117. And as the same *Scire facias* shall charge both Heirs in their several Rights, with equal

Of Borough-English.

qual Reason may the same Declaration in the Case above.

The youngest Son is not Heir to take by Purchase an Estate of Borough-English Lands limited to the *Heirs* of his Father. *Ante* 118. Otherwise if the Devise be to the Heir in Borough-English. *Ibid.*

The youngest Son is not Heir to take Advantage of a Condition annexed to Borough-English Lands. *Ante* 119. Except it be a Condition incident to a Reversion. *Ante* 120.

Where Words of Condition shall be construed a Limitation, in a Will of Borough-English Lands, and where not, *vide ante* 122, 123.

The youngest Son is not Heir to take Advantage of a Warranty annexed to Borough-English Lands. *Ante* 123. Nor shall he be barred by such Warranty. *Ante* 124.

But he may be vouched, and in what Manner, *vide ante* 127. And in such Case may deraign the Warranty paramount. *Ante* 129.

The youngest Son and Heir apparent could not endow his Wife *ex assensu Patris* of Borough-English Lands. *Ante* 184.

It is said, that if a Man has Lands in Borough-English, and several Sons, he shall not therefore have the Wardship of his youngest Son, because by Possibility he may not continue Heir; as another Son may be born. 3 Rep. 38. a. 6 Rep. 22. a.

If

Of Borough-English.

If Copyhold Land of the Custom of Borough-English be surrendered to the Use of a Man and his Heirs, who dies before Admittance, the Right shall descend to the youngest Son. *Ante 98.* But if the Custom be only, that the Land of every Tenant dying seised shall descend to the Youngest, then the Eldest shall be admitted, in Case the Surrenderee dies before Admittance. *Ante 98.*

Where, Copyhold Lands of the Nature of Borough-English being devised to the eldest Son, Equity will supply the Defect of a Surrender to the Use of such Will, and where not. *Ante 99.*

Geo. Reeve, having Issue three Sons, *William*, *George*, and *Charles*, and being seised in Fee of a Copyhold within the Manor of *Hoe* in *Suffolk*, which by the Custom of the Manor was descendible to the youngest Son of the Tenant dying seised, according to the Nature of Borough-English, surrendered this Copyhold to the Use of himself and *Anne* his Wife, and of his own Heirs, and he and his Wife were admitted accordingly. Afterwards 2 *Jac.* *George* the Father died seised, the Reversion descended to *Charles* his youngest Son: *Anne* entered and enjoyed the Land for her Life, and afterwards 12 *Jac.* *Charles* died without Issue; and in 6 *Car.* *Anne* died. The sole Question was, whether *William Reeve*, eldest Son and Heir at Law of *George* the Father, and Brother and Heir to *Charles*, who had this Reversion as youngest Son and Heir in Borough-English, or *George* the

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the middle Son should have the Land. It was agreed, that if the Mother had died before *Charles*, and *Charles* surviving had entred and died without Issue, then *William* should have had the Land as Heir to *Charles*; because the Custom of Borough-English extends not to Brothers, unless there be a special Custom found. But this being a Reversion expectant on an Estate for Life, and *Charles* never being seised of the Land in Possession, but dying without Issue in the Life of the Tenant for Life, *Brampston Ch. Just.* and *Berkeley Just.* argued strongly, that *George* the middle Son should have it, as if *Charles* had never been; for he shall make Title from his Father, and take by Descent from him who had the Seisin of the Freehold, and not make any Mention of him who had but the Reversion expectant on an Estate for Life; for the Custom shall be guided by the Rule of the Common Law, and here was no *Posseſſio fratris*; and compared it to the Case of Brothers of the half Blood. But *Jones* and *Croke* Justices held, that *William* the Eldest had the better Title; for in this Case, *Charles* the youngest Son, being the Heir in whom it vested by the Custom at the Death of his Father, it is an Inheritance fixed in him, and the Custom has its Operation and is satisfied in him, and there is an End of the Custom, and none shall claim after but he that is Heir to him; and the youngest Son only, who is *in Esse* at the Death of his Father, shall have it by the Custom, and not any other, who shall

I

come

13
51

Of Borough-English.

come to be youngest afterwards. *Reeve*
and *Malster*, *Cro. Car.* 410. *W. Jones* 361.
abridged in 1 *Roll. Abr.* 624. Where *Rolls*
seems plainly to incline to the latter Opinion.
But *Holt* Ch. Just. says, 1 *Show.* 249. that
the middle Son, in this Case, might entitle
himself as Heir to his Father. And so the
same Judge 6 *Mod.* 122. *Salk.* 244. in the
Case of *Clement* and *Scudamore* approves of
the Opinion of *Brampston* and *Berkeley*, for
that if the Opinion of *Croke* should prevail,
it would beget Abundance of Confusion,
but the other would settle Things on a sure
and lasting Foundation. And the Determin-
ation in the Case of *Newton* and *Shafto*,
1 *Lev.* 172. 1 *Sid.* 267. bears some Resem-
blance to the Case above. Custom of the
Manor of *Tinmouth*, that if a Copyholder
dies leaving no Son, but two or more
Daughters, the eldest Daughter shall have it
only for her Life, and then it shall descend
to the next Heir Male, deriving his Title
through Males, or if no such, escheat to the
Lord; and likewise, that after the Death of
the Copyholder, his Wife shall have it for
Life. The Wife entred, and the elder
Daughter died in the Wife's Life-time, and
afterwards the Wife died; and the Court
held the Custom good, and that the second
Daughter should have the Land for her Life
within the Custom, for tho' she was not eld-
est Daughter at the Death of her Father,
yet she was at her Mother's Death, whose
Estate was a Continuance of the Husband's
S f Estate

Of Borough-English.

Estate till her Death, as in the Case of Free-Bench.

Per *Croke* and *Jones* Justices in the Case above of *Reeve* and *Malster*, if a Man has Issue a Son, and dies seised in Fee of Land in Borough-English, his Wife enseint of another Son, the Son *in Esse* shall have it by the Custom, and the Son born afterwards shall not divest him, because he was youngest at the Death of his Father. But *Brampston* and *Berkeley* held the contrary: And, as it seems, with good Reason; for even customary Descents, in their Incidents and Consequences, shall be governed by the Principles of the Common Law; the Rule of which is, that an Estate vesting by Descent may be divested again on the Birth of a Person having a nearer Title.

J. C. Forrest. *Lutwyche* and *Lutwyche*; *Canc. Hill.*
276. 8 Geo. 2. 1734. A Cause by Consent for

the Opinion of the Court; wherein *Talbot*, Lord Chancellor decreed, that the late Mr. *Lutwyche's* younger Son should have his whole distributive Share of his Father's personal Estate, who died Intestate, without bringing into Hotchpot a Copyhold at *Turnbam-Green*, which being of the Nature of Borough-English descended to him from his Father; for that such Estate descended

22 & 23 Car. 2. is not within the Statute of Distributions:
10. sect. 5. Tho' *Jekyll*, Master of the Rolls, had decreed the contrary in the Case of *Pratt* and

J. C. Holt. *Pratt*: Which was thus. The late Chief Justice *Pratt* purchased a Copyhold in Borough-English, which was surrendered to the

Of Borough-English.

the Use of himself for Life, Remainder to the Use of his Wife for Life, Remainder to the Use of his own right Heirs; and was admitted accordingly, and died Intestate, leaving several Children; the Master of the Rolls 29 May 1731, held, that the youngest Son should not have his distributive Share of the personal Estate of his Father, unless he brought the Borough-English into Hotchpot. But this was afterwards reversed by Talbot, Lord Chancellor, who decreed as he had before in the Case of *Lutwyche* and *Lutwyche*.

*In the Borough English
Copyhold case of Payne v.
Barker in 3. Bridgman: Alf.
Rep. 140.*

F I N I S.



21 X 11